Certificate and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1926

No. 898

HARRY R. ALSTON

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED FEBR[illegible]RY 14, 1927

(32,465)

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INDEX

	Original	Print
Certificate from the United States circuit court of appeals, eighth circuit	*a*	1
Statement of case	*a*	1
Questions certified	*c*	3
Judges' signatures	*c*	3
Clerk's certificate (omitted in printing)	*d*	
Proceedings in the United States circuit court of appeals, eighth circuit	*e*	4
Caption (omitted in printing)	*f*	
Citation and service (omitted in printing)	1	
Writ of error and return	2	4
Record from the district court of the United States, southern Iowa	4	5
Indictment	5	5
Minute entries of arraignment and plea	8	7
Judgment	9	7
Petition for writ of error	11	8

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	Original	Print
Assignments of error	13	9
Praecipe for transcript of record	15	11
Clerk's certificate (omitted in printing)	16	
Appearances of counsel (omitted in printing)	17	
Motion for leave to file first amended assignments of error	18	12
Motion to reduce amount of bond	20	14
Resistance to motion to reduce amount of bond	21	15
Notice of hearing of motions	22	16
Order granting leave to file amended assignments of error	23	17
Order denying motion to reduce amount of bond	24	17
Motion to submit case on typewritten record and briefs	25	18
Order granting leave to submit on typewritten record and briefs	27	19
Submission of cause (omitted in printing)	28	
Order to certify question to Supreme Court	29	20
Certificate (copy) (omitted in printing)	30	
Application for reduction of bond, etc	33	21
Notice of hearing	36	23
Resistance to application for reduction of bond	37	24
Order denying application for reduction of bond	39	25
Order that entire record be sent up	40	25
Clerk's certificate (omitted in printing)	41	

[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

SEPTEMBER TERM, A. D. 1926

No. 7122

HARRY R. ALSTON, Plaintiff in Error,

v.

UNITED STATES OF AMERICA, Defendant in Error

In Error to the District Court of the United States for the Southern District of Iowa

Messrs. John B. Boddie and Frans E. Lindquist for plaintiff in error.

Hon. Ross R. Mowry, United States Attorney, Mr. Ray C. Fountain, Assistant United States Attorney, and Mr. Frank F. Wilson, Assistant United States Attorney, for defendant in error.

Before Stone, Van Valkenburgh, and Booth, Circuit Judges

STATEMENT OF CASE

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

On the second day of December, 1924, an indictment was returned charging Harry R. Alston with a violation of the Act of December 17, 1914 (38 Stat. 785) as amended by the Acts of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006) and of November 23, 1921 (42 Stat. 227, 298, sec. 1005) in that he had purchased morphine (a derivative of opium) and cocaine (a derivative of coco leaves) in packages not bearing and having affixed appropriate tax paid stamps as required by the Act as thus amended.

To that indictment, Alston entered a plea of guilty upon which he was adjudged guilty and sentenced to imprisonment for a term of four years.

Within due time thereafter, Alston sued out a writ of [fol. b] error from the above judgment. Among the Assignments of Error are the following:

"Fourth

That the said Acts of February 24, 1919 and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to The Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by its [it] to the States, but such power is reserved to the States respectively and to the people.

Fifth

That the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, cannot be upheld as a revenue measure."

Plaintiff in error presents to this court the contention that the Congress was without Constitutional authority to enact the above legislation making the purchase of the designated narcotics unlawful. The basis of this contention is that such a prohibition is an exercise of police power; that such character of power is vested in the several States exclusively by the Constitution of the United States; and that the above enactments cannot be sustained as an exercise of the revenue power of the National Government because they are not revenue measures but are purely police measures.

This court has, in numerous cases heretofore, proceeded upon the assumption that the validity of the above Congres-

sional enactments had been sustained by the Supreme Court. However, in the recent case of United States v. Daugherty (269 U. S. 360) the court makes use of the language following:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in United States v. Doremus, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44, 67; and Linder v. United States, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

In view of the above expression of the Supreme Court, this court is doubtful of its duty and desires the instruction of the Supreme Court upon the following question, a decision of which is indispensable to a determination of this case [fol. c] before it and to the proper discharge of its duties herein.

QUESTION CERTIFIED

Question I. Are the Acts of December 17, 1914 (38 Stat. 785), of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006) and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments as being within the power delegated to the Congress by the Constitution of the United States?

[fol. c] Kimbrough Stone, United States Circuit Judge. Arba S. Van Valkenburgh, United States Circuit Judge. Wilbur S. Booth, United States Circuit Judge, being the judges who sat in the Circuit Court of Appeals on the hearing of the case.

[fols. d & e] Clerk's certificate to foregoing paper omitted in printing.

[fol. f] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Ross R. Mowry, filed June 5,1925, omitted in printing.

[fol. 2] In United States Circuit Court of Appeals

Writ of Error and Return

United States of America, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the December Term, 1924, thereof, between United States of America, Plaintiff, vs. Harry R. Alston, Defendant, Criminal, No. —, a manifest error hath happened, to the great damage of the said Harry R. Alston, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 26th day of July, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 26th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in the City of Des Moines with the seal of the District Court of the United States for the Southern District of Iowa.

Dated as aforesaid.

N. F. Reed, Clerk District Court United States, Southern District of Iowa, by —— ——, Deputy. (Seal.)

Allowed by Wm. S. Kenyon, Circuit Judge.

[fols. 3 & 4] RETURN TO WRIT

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Court, at office in the City of Des Moines, this 24th day of July A. D. 1925.

N. F. Reed, Clerk of said Court. (Seal.)

[fol. 5] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA

INDICTMENT—Filed December 2, 1924

The Grand Jurors of the United States of America, duly empaneled, sworn and charged to inquire in and for the body of the Southern District of Iowa, at a term of the United States District Court, begun and held at Des Moines, in said division and district, on the 25th day of November, A. D. 1924, in the name and by the authority of the United States of America, upon their oaths do find and present:

Count One

That one Harry R. Alston, on or about the 24th day of July in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the city of Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase opium, and a derivative and preparation thereof, to-wit, morphine, from a person or persons who to this grand jury was unknown, said morphine being in and from certain packages which said packages were not then and there the original stamped packages containing said mor-

[fol. 6] phine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: That the said Harry R. Alston, on or about the 6th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the City of Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase opium, and a derivative and preparation thereof, to-wit, morphine, from a person or persons who to this grand jury are unknown, said morphine being in and from certain packages which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Three

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: That one Harry R. Alston, on or about the 6th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-Four, in the city of Des Moines, County of Polk and State of Iowa, in [fol. 7] the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did unlawfully, wilfully and feloniously purchase coco leaves, and a

derivative and preparation thereof, to-wit, cocaine, from a person or persons who to this grand jury are unknown, said cocaine being in and from certain packages which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said act as amended, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) Ray C. Fountain, Assistant United States Attorney.

[fol. 8] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF ARRAIGNMENT AND PLEA—December 2, 1924

On this day comes the grand jury into open court and by their foreman return a true bill of indictment against Harry R. Alston, charging him with having violated an Act of Congress approved December 17th, 1914, to-wit: Harrison Drug Act which indictment is filed in open court and in the presence of the grand jury. On motion of F. F. Wilson, Asst. U. S. Attorney, it is ordered that the defendant be now arraigned whereupon he answers that his true name is Harry R. Alston and pleads guilty to the charges contained in the indictment filed herein. It is ordered that cause be passed for sentence.

[fol. 9] IN UNITED STATES DISTRICT COURT

JUDGMENT—December 29, 1924

On this day this cause comes on for judgment upon the plea of guilty heretofore entered, the plaintiff appearing by Ray C. Fountain, Asst. U. S. Attorney, and the defend-

ant appearing in his own proper person. Thereupon it is inquired of the defendant what if anything he has to say why the judgment of the Court should not now be pronounced, and he having said what he desired to say and having nothing further to say, it is ordered and adjudged that the defendant, Harry R. Alston be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count one of the indictment filed herein; it is further ordered and adjudged that the defendant, Harry R. Alston, be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count Two of the indictment filed herein; it is further ordered and adjudged that the defendant, Harry R. Alston, be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a term of four years under Count Three of the indictment filed herein; it is further ordered that the sentences imposed under Counts Two and Three shall run concurrently with the sentence imposed under Count One of the indictment filed herein. It is further ordered and adjudged that the defendant, Harry [fol. 10] R. Alston pay the costs of this prosecution taxed at $—, under Count One of the indictment filed herein, said costs to stand on execution until the further order of the Court.

[fol. 11] IN UNITED STATES DISTRICT COURT

PETITION FOR A WRIT OF ERROR—Filed June 4, 1925

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

And now comes Harry R. Alston, the defendant in the above entitled cause, and respectfully represents and shows to Your Honors that heretofore, on the 2nd day of December, A. D. 1924, the Grand Jurors of the United States within and for the Central Division of the Southern District of Iowa, returned into said United States District Court, a certain indictment, in three counts, against the above named defendant, charging him with pretended violations of the Harrison Drug Act, to which said defendant entered a plea of guilty as charged.

That thereafter, on the 29th day of December, A. D. 1924, upon such plea of guilty, the defendant was sentenced to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of said indictment, for a term of four years, under the second count of said indictment, and for a term of four years under the third count of said indictment, and that the sentences imposed under counts two and three should run [fol. 12] concurrently with the sentence imposed under count one of said indictment, and that the defendant pay the costs of such prosecution, to be collected on execution.

That the said defendant feels himself aggrieved by the said judgment and sentence aforesaid, all of which is more fully shown by the Assignment of Errors filed herewith and made a part of this petition.

Wherefore the defendant (plaintiff in error) prays that a writ of error may issue from the United States Circuit Court of Appeals for the Eighth Circuit, to the United States District Court, for the Southern District of Iowa; that said writ of error may be made a supersedeas, and that the plaintiff in error may be released on bail, in such amount as may be fixed by Your Honors, pending the final hearing and disposition of said writ of error, and that a Citation may be issued, directed to the defendant in error, returnable as required by law and the rules of this court.

(Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[fol. 13] In United States District Court

Assignments of Error—Filed June 4, 1925

And now comes Harry P. Alston, Plaintiff in Error, the defendant in the above entitled cause, and says that in connection with his Petition for a Writ of Error, in the indictment, record, proceedings and final judgment, error has intervened to his prejudice, as follows, to-wit:

First

That the judgment and sentence, imposed by the District Court, in the above entitled cause, on the 29th day of De-

cember, A. D. 1924, upon his plea of guilty as charged in three counts of the indictment, that he be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of the indictment; for a term of four years under count two of the indictment and for a term of four years under count three of the said indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one, and to pay the costs of the prosecution, to be collected on execution, is contrary to and in violation of the Fifth Amendment to the Constitution of the United States, in that he is deprived of his liberty without [fol. 14] due process of law, and the District Court had no power or jurisdiction to impose said judgment and sentence, for the reasons following, to-wit:

(a) That said counts one, two and three of said indictment are based upon section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coco leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914, (commonly known as the Harrison Anti-Narcotic Act) 38 Stat. 785, but that the said Acts of February 24, 1919 and November 23, 1921, respectively, attempting to make it unlawful to "Purchase" any of such drugs, fixes no penalty for violation thereof.

(b) That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, cannot apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919 and November 23, 1921, as aforesaid.

(c) That by reason of the failure of Congress to fix any punishment for the "purchase" of such drugs, the District Court had no power or jurisdiction to impose the judgment and sentence aforesaid upon the defendant, and the same is illegal, null and void, for want of jurisdiction.

Wherefore Plaintiff in Error prays that said judgment and sentence be set aside and said cause be reversed, without remanding it for a new trial.

(Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[fol. 15] In United States District Court

Præcipe for Transcript of Record—Filed June 5, 1925

To the Hon. N. F. Reed, Clerk:

In preparing the Transcript of Record on writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, you are respectfully requested to include the following:

1. Copy of the Indictment filed Dec. 2nd, 1924.
2. Plea of guilty, December 2nd, 1924.
3. Sentence, December 29th, 1924.
4. Petition for a Writ of Error.
5. Assignment of Errors.
6. Citation with admission of service thereof.
7. Original Writ of Error.

Respectfully, (Signed) John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

Service of the foregoing Præcipe is hereby accepted this 5th day of June, 1925.

(Signed) Ross R. Mowry, United States Attorney, Attorney for Defendant in Error. Ray C. Fountain, Assistant U. S. Attorney.

[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 17] Appearances of counsel omitted in printing.

[fol. 18] In United States Circuit Court of Appeals for the Eighth Circuit

No. 7122

Harry R. Alston, Plaintiff in Error,

vs.

The United States of America, Defendant in Error

Motion for Leave to File First Amended Assignments of Error—Filed August 7, 1925

Comes now the Plaintiff in Error in the above entitled cause, and respectfully moves this Honorable Court to grant him permission to file his First Amended Assignment of Errors, in order that the questions of law involved in this case may be more fully presented and the rights of the Plaintiff in Error protected, so as to read as follows, to-wit:

First

That said counts one, two and three of said indictment are based on Section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coco leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914, (commonly known as the Harrison Anti-Narcotic Act) 38 Stat. 785, but that the said Acts of February 24, 1919 and November 23, 1921, respectively, attempting to *to* make it unlawful to "purchase" any such drugs, fixes no penalty for violation thereof.

Second

That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, cannot apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919 and November 23, 1921, aforesaid.

Third

That the first, second and third counts of said indictment, to which the Plaintiff in Error entered a plea of guilty as charged, do not state facts sufficient to constitute any crime against the laws of the United States of which the United States District Court for the Southern District of Iowa, Central Division, has any jurisdiction, and is violative of the Sixth Amendment to the Constitution of the United States, in that the said counts do not inform the Plaintiff in Error of the nature and cause of accusation against him.

Fourth

That the said Acts of February 24, 1919 and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is viola- [fol. 19] tive of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by it to the States, but such power is reserved to the States respectively and to the people.

Fifth

That the *the* "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, cannot be upheld as a revenue measure.

Sixth

That by reason of the failure of Congress to fix any punishment for the "purchase" of such drugs, upon the "purchaser", the United States District Court for the Southern District of Iowa, Central Division, had no power or jurisdiction to impose the judgment and sentence upon the Plain-

tiff in Error that he be confined in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment, for a term of four years under count two of the indictment and for a term of four years under count three of said indictment, such sentences to run concurrently, and such sentences are null and void, for want of jurisdiction, and the Plaintiff in Error is detained, restrained and deprived of his liberty without due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 20] In United States Circuit Court of Appeals

[Title omitted]

Motion to Reduce Amount of Bond—Filed August 15, 1925

Comes now the above named Plaintiff in Error, by John B. Boddie and Frans E. Lindquist, his attorneys, and respectfully moves this Honorable Court to reduce the amount of the appearance bond of the plaintiff in error, pending the hearing and final determination of this case, in order that said plaintiff in error may be released from the United States Penitentiary at Leavenworth, Kansas, for the reasons following, to-wit:

1. That after the issuance of the writ of error and the service of the citation, the plaintiff in error presented to the Honorable Wm. S. Kenyon, one of the Judges of this Honorable Court, his Motion to be admitted to bail, on which the said Judge made the following order, "Bond fixed at $5,000.00 St. Paul June 16, 1925. Wm. S. Kenyon, Judge," which said Motion is now filed in the office of the Clerk of the United States District Court at Des Moines, Iowa.

2. That the plaintiff in error has been unable to furnish a bond in said sum of $5,000.00.

3. That by reason of the grounds alleged in the Motion for leave to file First Amended Assignment of Errors, which are referred to and made a part of this motion, the plaintiff in error is now detained, restrained and deprived of his liberty, in the said United States Penitentiary, in violation of the Fifth Amendment to the Constitution of the United States, without due process of law.

4. That said order that the plaintiff in error be required to enter into an appearance bond in the sum of $5,000.00 is excessive and in violation of the Eighth Amendment to the Constitution of the United States.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 21] In United States Circuit Court of Appeals

[Title omitted]

Resistance to Motion to Reduce Amount of Bond—Filed August 17, 1925

Comes now the United States of America, the Defendant in Error in the Above entitled cause, by Ross R. Mowry, United States Attorney for the Southern District of Iowa, and as and for resistance to the motion of the Plaintiff in Error for an order reducing the amount of the appearance bond of the plaintiff in error pending the hearing and final determination of this case, respectfully states to the Court:

1. That the Plaintiff in Error in this cause was duly indicted by the Grand Jury in the Central Division of the Southern District of Iowa and said indictment was formally returned into Court by the grand jury which voted the same.

2. That the crime charged in the indictment filed against this Plaintiff in Error in the United States District Court was a serious offense against the laws of the United States.

3. That this Plaintiff in Error entered his Plea of Guilty to the offense charged in the indictment returned against him in United States District Court, and the Court, after hearing all the facts in the matter and giving the defendant an opportunity to be heard imposed a sentence of four (4) years in the penitentiary.

4. That the bond of Five Thousand ($5,000.00) Dollars as fixed in this appeal is not excessive and is no more than an adequate bond in view of the charge on which this Plaintiff in Error was convicted in District Court.

It is therefore asked that the Motion of the Plaintiff in Error be denied.

Ross R. Mowry, United States Attorney for the Southern District of Iowa and Attorney for Defendant in Error.

[File endorsement omitted.]

[fol. 22] In United States Circuit Court of Appeals

[Title omitted]

Notice of Hearing of Motions—Filed August 18, 1925

To the Honorable Ross R. Mowry, United States Attorney and Attorney for the Defendant in Error:

You are hereby notified that the Plaintiff in Error will, on Monday, the 17th day of August, 1925, at the hour of ten o'clock A. M., submit to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St Louis, Missouri, the following motions, to-wit:

1. Motion for leave to file First Amended Assignment of Errors.

2. Motion to reduce amount of bond.

Respectfully, John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

Copies of the foregoing Motion for leave to file First Amended Assignment of Errors, Motion to reduce amount

of bond, and of this Notice, admitted, this 14th day of August, 1925.

Ross R. Mowry, United States Attorney, Attorney for Defendant in Error, by ——— ———, Assistant U. S. Attorney.

[File endorsement omitted.]

[fol. 23] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to File First Amended Assignments of Error—August 24, 1925

This cause came on to be heard on the notice and motion for leave to file first amended assignment of errors, and there being no objections interposed. It is now here ordered by this Court that leave be, and is hereby, granted to plaintiff in error to file his first amended assignment of errors.

[fol. 24] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Motion to Reduce Amount of Bond—August 24, 1925

This cause came on to be heard on the notice and motion of the plaintiff in error to reduce the amount of bond required of the plaintiff in error pending the hearing and final determination of this cause in this Court, in order to release the plaintiff in error from the United States Penitentiary at Leavenworth, Kansas, and upon the resistance to said motion filed in behalf of defendant in error.

Upon consideration of said motion and response thereto, It is now here ordered that the motion to reduce the amount of bond heretofore fixed at Five Thousand ($5,000.00) Dollars by one of the Judges of this Court be, and the same is hereby, denied.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO SUBMIT CASE ON TYPEWRITTEN RECORD AND BRIEFS —Filed September 12, 1925

Now comes the above named Harry R. Alston, by his Attorneys and respectfully represents and shows to this Honorable Court, that by reason of his poverty, he has been unable to pay his attorneys, John B. Boddie and Frans E. Lindquist, any portion of their fees for prosecuting this cause on a writ of error, and that by reason of his poverty, he is unable to pay the cost and expenses of printing the Transcript of Record and Briefs in the above entitled cause.

Said Harry R. Alston says that he has a just and meritorious cause, and verily believes that the judgment of the United States District Court should be reversed, without remanding, for the reasons specifically set forth in his First Amended Assignments of Error.

Wherefore the Plaintiff in Error prays that he may be allowed to prosecute this case as a poor person.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

Duly sworn to by Harry R. Alston. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 26] Report of Assistant United States Attorney as to Ability of Plaintiff in Error to Pay Court Costs, etc.—Filed October 12, 1925

Department of Justice, Office of United States Attorney, Southern District of Iowa

October 9, 1925.

Hon. E. E. Koch, Clerk Circuit Court of Appeals, St. Louis, Missouri.

Dear Sir:

Re Harry R. Alston vs. U. S., No. 7122

The only information I have been able to secure concerning the above Harry R. Alston is that he formerly worked as porter for the Chicago Great Western Railroad and that he made his home in Kansas City. He has no property in this District so far as I am able to learn, and I have no doubt but that he is unable to pay the costs for the printing of the transcript of record in his case and for the printing of the briefs in the same.

Yours very truly, Ray C. Fountain, Asst. U. S. Atty.

RCF:WC.

[File endorsement omitted.]

[fol. 27] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to Submit on Typewritten Record and Briefs—November 3, 1925

This cause is called to the attention of the Court on the motion and affidavit of plaintiff in error for leave to prosecute the same as a poor person for the reason that he is unable to pay the cost and expenses of printing the transcript of the record and briefs.

On Consideration of said motion and affidavit and the report of the Assistant United States Attorney for the Southern District of Iowa as to the ability of plaintiff in error to pay Court costs, etc., It is ordered by this Court that the plaintiff in error be, and he is hereby, granted leave to have his writ of error heard and determined by this Court on the typewritten transcript of the record from said District Court, and upon typewritten briefs in his behalf, five clear typewritten copies of the brief to be filed with the Clerk of this Court within the time provided by the rules.

[fol. 28] Minute Entry of Submission of Cause January 21, 1926, omitted in printing

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[fol. 29] In United States Circuit Court of Appeals

[Title omitted]

Order to Certify Question to Supreme Court U. S.—November 15, 1926

A certain question having arisen on the record in this cause upon which this Court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such question having been prepared and duly signed, It is now here ordered by this Court that such certificate be filed and entered of record in this Court, and that the original thereof be duly certified by the Clerk of this Court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

[fols. 30-32] Certificate omitted; printed side page 1 ante.

[fol. 33] In United States Circuit Court of Appeals

[Title omitted]

Application for Reduction of Bond and Release Pending a Final Decision

Comes now the above named Plaintiff in Error and respectfully represents and shows to this Honorable Court:

First. That on the 2nd day of December, 1924, in the District Court of the United States at Des Moines, Iowa, he entered a plea of guilty as charged in the first, second, and third courts of the indictment, and was thereafter on the 29th day of December, 1924, sentenced to imprisonment in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one: four years under count two, and four years under count three, the sentences imposed under counts two and three to run concurrently with the sentence under the first count and committed accordingly.

Second. That thereafter on the — day of May, 1925 and within six months the said Harry R. Alston sued out a writ of error from this Honorable Court, and a citation was duly issued, served on the United States Attorney and filed.

Third. That thereafter upon his application the Plaintiff in Error was admitted to bail in the sum of $5,000.00 and required to enter into a good and sufficient bond, with good and sufficient sureties, but that by reason of poverty, he was unable to furnish such bond.

Fourth. That thereafter, in due course, the said cause was submitted on briefs, and taken under advisement by [fol. 34] this Honorable Court, the questions of law in issue being whether the Plaintiff in Error can be punished for purchasing narcotic drugs, there being no penalty attached as to the purchaser, and whether the Harrison Act is not unconstitutional and in violation of the Tenth Amendment to Constitution of the United States, not being within the power delegated to the Congress by the Constitution of the United States, so far as the purchaser is concerned.

Fifth. That thereafter on the — day of November 1926, this Honorable Court, after a careful consideration of the case, certified the following questions to the Supreme Court of the United States:

"Are the Acts of December 17, 1914, (36 Stat. 785) of February 24, 1919, (40 Stat. 1057, 1130, Sec. 1006) and of November 23, 1921 (42 Stat. 227, 298 Sec 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid inactments, as being within the power delegated to the Congress by the Constitution of the United States?"

Sixth. That the said certified question has been transmitted to the Supreme Court of the United States, and will not be answered until after the filing of the briefs, and oral arguments, respectively, during all of which time no final decision can be made by this Honorable Court, and the Plaintiff in Error will not be released on parole, although he has served more than one-third of the said sentence.

Seventh. That unless the Plaintiff in Error be released on bail, pending the final determination of this cause, he will be compelled to remain in said United States Penitentiary, although this Honorable Court will upon receipt of an answer in the negative, from the Supreme Court of the United States, hold that no crime has been committed and that the Congress is without jurisdiction to punish the purchaser of such narcotic drugs, and that, by reason thereof the Plaintiff in Error has during all of said period of time [fol. 35] been deprived of his liberty without due process of law contrary to and in violation of the Fifth Amendment to the Constitution of the United States, and he has redress, or remedy at law for damages or otherwise, by reason of having been so deprived of his liberty.

Eighth. That if, on the other hand, the judgment and sentence of four years be affirmed and the said Harry R. Alston is at liberty on bail, he will, at once, return to said United States Penitentiary at Leavenworth, Kansas, at his own cost and expense to serve the remainder of his said sentence, with allowance of good conduct, or until released on parole, and the United States of America will suffer no injuries by reason of having released him on bail.

Ninth. That by reason of poverty, said Harry R. Alston has been unable to furnish a good and sufficient bond with good and sufficient sureties capable of qua*l*fying as such sureties, and has been unable to pay his attorneys for services rendered and to be rendered in the prosecution of this cause, and he verily believes that he will be unable to obtain sureties on such bond, who can qualify.

Tenth. That in order that said Harry R. Alston may obtain the benefit of a successful prosecution of this writ of error and in equity and justice, the said Harry R. Alston should be released from said United States Penitentiary upon signing his own recognizance, without additional sureties.

Wherefore Plaintiff in Error prays that his bond be reduced, and that he may be released on bond pending the hearing and final determination of this cause, and for all proper relief.

John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

[fol. 36] *Duly sworn to by Harry R. Alston. Jurat omitted in printing.*

In United States Circuit Court of Appeals

Notice of Hearing—Filed December 15, 1926

To the United States Attorney for the Southern District of Iowa:

You are hereby notified that the foregoing application will be presented to the Honorable the United States Circ*i*ut Court of Appeals for the Eighth Circ*i*ut, at the City of St. Louis, Missouri, on the 16th day of December, 1926, at 9:30 o'clock A. M.

Respectfully, John B. Boddie, Frans E. Lindquist, Attorneys for Plaintiff in Error.

I hereby certify that at the City of St. Paul, Minnesota, on the 13th day of December, 1926, I mailed a copy of the

foregoing application and motion to The United States Attorney, Des Monies, Iowa.

Frans E. Lindquist, Attorney for Plaintiff in Error.

[File endorsement omitted.]

[fol. 37] In United States Circuit Court of Appeals

[Title omitted]

Resistance to Application for Reduction of Bond—Filed December 16, 1926

Comes now the above named Defendant in Error and in resistance to the Plaintiff in Error's application for reduction of bond, respectfully represents and shows to this Honorable Court:

First. That the Honorable Wm. S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, on the 16th day of June, A. D. 1925, at St. Paul, Minnesota, fixed the Plaintiff in Error's bond at $5,000.00, which is entirely just and of an amount commensurate with the facts in this case.

Second. That the above named Plaintiff in Error had, before the conviction in the above entitled cause, been previously convicted of violating the Harrison Drug Act and merits no charity from this Court.

Third. That Count One of the Indictment charges an offense on the 24th day of July, 1924, and Counts Two and Three charge offenses on the 6th day of October, 1924. These facts in addition to the previous record of the defendant shows that he has absolutely no regard for the law, and that his representation that he would appear voluntarily if released upon his own recognizance, if required, could not be relied upon whatsoever.

Fourth. That while the Plaintiff in Error plead guilty to Counts charging the unlawful purchase, the facts in the case disclosed circumstances tending to strongly indicate

that the Plaintiff in Error was engaged in the business of selling narcotics.

[fol. 38] Wherefore the United States of America, the Defendant in Error, respectfully prays that the Plaintiff in Error's application for reduction of bond be denied, and that the amount of bail heretofore fixed by the Honorable Wm. S. Kenyon, to-wit, Bail in the sum of $5,000.00, stand.

Ray C. Fountain, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 39] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Application for Reduction of Bond, etc.—January 31, 1927

In this cause counsel for the plaintiff in error filed an application for reduction of bond and release pending a final decision by this Court, and counsel for defendant in error filed a resistance to said application.

This application and resistance having been called to the attention of the Court, It is, after due consideration, now here ordered that the application for reduction of bond and release pending the final decision by this Court be, and the same is hereby, denied.

[fol. 40] In Supreme Court of the United States

Order That Entire Record be Sent up—March 7, 1927; Filed in U. S. C. C. A. March 11, 1927

Motion for leave to proceed further in this cause in forma pauperis is granted. The case having been brought into this court on the certificate of the judges of the United States Circuit Court of Appeals for the Eighth Circuit, the Court now orders that the whole record herein be sent up to this

Court and directs the Clerk that the printing herein shall not be done until the complete record is received. The application of Alston, the plaintiff in error in the Circuit Court of Appeals, asking that the case be advanced, is granted and the case set for hearing April 11, 1927, after the cases heretofore assigned for that day.

The costs already incurred herein, by direction of the Court, as well as the costs of printing shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926.

A true copy. Test:
Wm. R. Stansbury, Clerk of the Supreme Court of the United States. (Seal.)

[File endorsement omitted.]

[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] [File endorsement omitted.]

Endorsed on cover: File No. 32,465. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 898. Harry R. Alston vs. The United States of America. (Certificate.) Filed February 14th, 1927. File No. 32,465.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

HARRY R. ALSTON,
Plaintiff in Error,

v.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 898

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ADVANCE

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Chicago, Illinois.

FRANS E. LINDQUIST,
835 Rondo Street,
St. Paul, Minnesota,

Attorneys for Plaintiff in Error.

FRANK T. RILEY PUB CO KANSAS CITY MO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

HARRY R. ALSTON,
Plaintiff in Error,

v.

UNITED STATES OF AMERICA,
Defendant in Error.

No. .....

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ADVANCE

Comes now, Harry R. Alston, the plaintiff in the above entitled cause, and respectfully moves this Honorable Court to advance the hearing of the above entitled cause, to the end that the question certified may be answered before the adjournment of the October Term, 1926, for the reasons following, to-wit:

FIRST

That on the second day of December, 1924, the Grand Jurors of the United States for the Southern District of Iowa, Central Division, returned into the

United States District Court, at Des Moines, Iowa, a certain indictment, in three counts, against said Harry R. Alston, charging that he did unlawfully, willfully and feloniously purchase opium, morphine and cocaine in and from certain packages, which said packages were not then and there the original stamped packages, and did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said Act as amended. Contrary, etc., to which charges the said Harry R. Alston, in person and without counsel, entered a plea of guilty.

SECOND

That thereafter, on the twenty-ninth day of December, 1924, in said United States District Court, at Des Moines, Iowa, before the Honorable Martin J. Wade, District Judge, the said Harry R. Alston was sentenced to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years, under count one of the indictment; for a term of four years under count two of the indictment, and for a term of three years under count three of the indictment. The sentences imposed under counts two and three to run concurrently with the sentence imposed under count one of said indictment, and that he pay the costs of such prosecution, and committed accordingly.

THIRD

That thereafter, and within six months from and after said judgment and sentence, the Honorable William S. Kenyon, Circuit Judge, allowed a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, and issued a citation, which citation was duly served, and the Transcript of Record filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, whereupon the said Harry R. Alston was allowed to prosecute said case as a poor person, and admitted to bail in the sum of $5,000, and required to enter into a recognizance, with good and sufficient sureties, which the said Harry R. Alston was unable to furnish.

FOURTH

That said cause was duly submitted on briefs in the said United States Circuit Court of Appeals for the Eighth Circuit, and taken under advisement.

FIFTH

That thereafter, on the ....day of November, 1926, the Honorable Kimbrough Stone, Circuit Judge the Honorable Arba S. Van Valkenburgh, Circuit Judge and the Honorable Wilbur F. Booth, Circuit Judge, being the three judges who sat in the said United States Circuit Court of Appeals for the Eighth Circuit when said cause was submitted, sent the following certified question to the Supreme Court of the United States (omitting statement of the case required by Rule 34 and signatures) in words and figures as follows, to-wit:

"Are the Acts of December 17, 1914 (38 Stat. 785), *of February* 24, 1919 (40 Stat. 1057, 1130, Sec. 1006), *and November* 23, 1921 (42 Stat. 227, 298, Sec. 1005), *declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?"*

SIXTH

That the United States Circuit Court of Appeals for the Eighth Circuit has denied the "Application for Reduction of Bond and Release on his own Recognizance," during the pendency of a final decision in this case.

SEVENTH

That unless this cause is advanced for hearing, and this Honorable Court will answer the certified question without delay, the said Harry R. Alston will have, with allowance for good conduct, served the entire sentence of four years before a final decision will be made in said cause, and the writ of error will avail him nothing.

EIGHTH

That Section 8 of Article I of the Constitution of the United States provides that "The Congress shall have power to lay and collect taxes, duties, imposts and excises," but that such power is limited to those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, and who fail to register and

pay the prescribed tax, under Act of December 17, 1914, and does not apply to the plaintiff in error, who is neither required to register nor pay such special tax.

NINTH

That the Acts of February 24, 1919, and November 23, 1921, while declaring it to be unlawful to "purchase" such narcotic drugs, fails to prescribe any penalty upon the "purchaser."

TENTH

That the Acts of February 24, 1919, and November 23, 1921, respectively, insofar as they attempt to make it unlawful to purchase such narcotic drugs, and to punish the "purchaser" are contrary to and in violation of the Tenth Amendment to the Constitution of the United States, being a matter within the reserved powers of the states.

ELEVENTH

That in cases of *United States v. Doremus*, 249 U. S. 86, and *Webb v. United States*, 249 U. S. 96, this Honorable Court upheld the validity of the Act of December 17, 1914, as a revenue measure, Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Deventer and Mr. Justice McReynolds dissented, because they were of the opinion that the Act of Congress, insofar as it embraced the matters complained of, were beyond the constitutional power of Congress to enact, being within the reserved powers of the States. Our Mr. Lindquist filed a petition for a rehearing and brief as *amicus curiae*, respectively, in said causes.

TWELFTH

That in the case of *Linder v. United States,* 268 U. S. 5, Your Honors, although laying down the rule that "Congress cannot, under the pretext of executing delegated power, enact laws for the accomplishment of objects not entrusted to the Federal Government, and any provisions of an Act of Congress, ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the powers reserved to the States, is invalid and unenforceable." Your Honors did not say whether the Act is constitutional or unconstitutional, all of which caused Your Honors to suggest, in case of *United States v. Daugherty,* 269 U. S. 360, that it may necessitate a review of that question if hereafter properly presented.

We respectfully submit that the question is fairly presented in this case.

Wherefore, the plaintiff in error, prays that the certified question be answered in the negative.

JOHN B. BODDIE,
FRANS E. LINDQUIST,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

NO. 393.

HARRY K. ALSTON, *Plaintiff in Error*,

vs.

UNITED STATES OF AMERICA, *Defendant in Error*.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, CERTIFIED QUESTION, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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WM. H. MASON,
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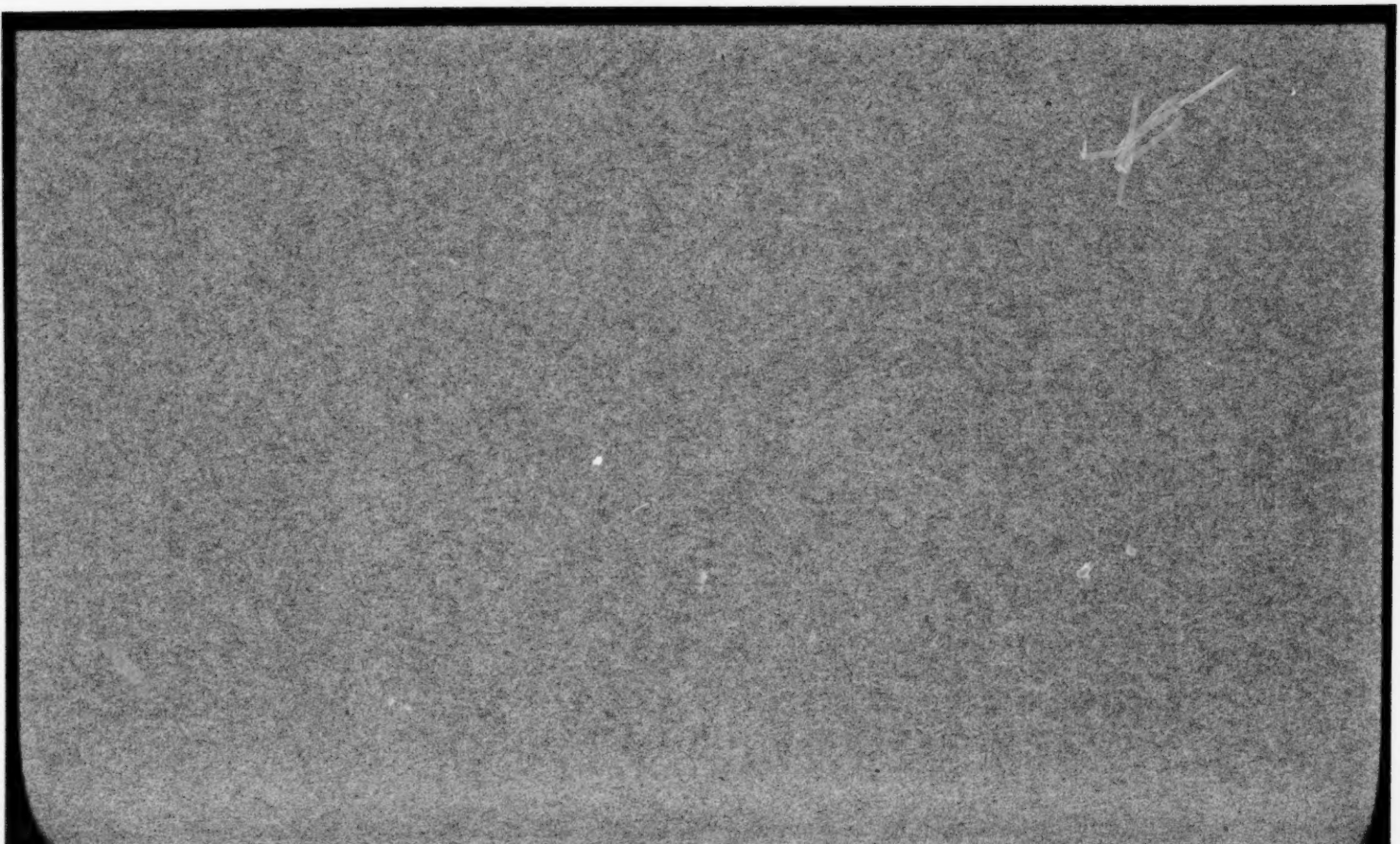

INDEX.

	Pages
Statement of the Case	1
First Count of the Indictment	1
Second Count	2
Third Count	2
Plea of Guilty, December 2, 1924	2
Sentence, December 29, 1924	2
Allowance of Writ of Error and issuance of Citation from the United States Circuit Court of Appeals for the Eighth Circuit	2
Transcript of Record Filed	3
Cause submitted in Briefs	3
Assignments of Error	3
Certified Question	5
Transcript of Record	5

AUTHORITIES.

Adkins et al vs. Children's Hospital of the District of Columbia 261 U. S. 525	19
Section 8—Article 1—Constitution of United States	9
Harrison Anti-Narcotic Act of December 17, 1914 (36 Stat. 785)	9
Punishment prescribed for violation Section 9	9
Harrison Anti-Narcotic Act of February 24, 1919 (40 Stat. 1057)	10
Harrison Anti-Narcotic Act of November 23, 1921 (42 Stat. 227)	10
Carroll vs. United States, 267 U. S. 132	10
Child Labor Tax Case, 259 U. S. 20	20
Connally vs. General Construction Co., 46 Sup. Ct. 126	11
Criminal Law, Sec. 30 C. J. 68-69	12
Fasulo vs. United States, 47 Sup. Court Rep. 200	
Hammer vs. Dagenhart, 247 U. S. 251	16, 20
Hyde vs. State, 131 Tenn. 208	16
Johnson vs. United States, 294 Fed. 753	14
Jin Fuey Moy vs. United States, 254 U. S. 189	17
Keller vs. United States, 213 U. S. 138	
License Tax Cases, 5 Wall. 462	
Linder vs. United States 268 U. S. 5	17
Lynch vs. United States, 10 Fed. (2d) 947	

Pages

Mossew vs. United States, 266 Fed. 18 12
McColloch vs. Maryland, 4 Wheat. 316 .....
Reese vs. United States, 14 Fed. (2d) 606 12
State of Minnesota vs. Whipple, 143 Minn. 403 .....
State of Minnesota ex rel Whipple vs. Martinson, Sheriff, 256 U. S. 41 21
Sofgi vs. Snoop, Warden, 15 Fed. (2d) 561 .....
State of Missouri vs. Kelley, 206 Mo. 685 .....
Teter vs. United States, 12 Fed. (2d) 224 .....
Yun Queng, Ex parte, 156 Calif. 508 16
United States vs. Cohen Grocery Co., 255 U. S. 81 .....
United States vs. De Witt, 9 Wall. 41 .....
United States vs. Doremus, 249 U. S. 86 15
United States vs. Jin Fuey Moy, 241 U. S. 394 14
United States vs. Katz et al, 46 Sup. Ct. 513 .....
United States vs. Seibert, 2 Fed. (2d) 80 .....
Webb, vs. United States, 249 U. S. 86 15
Weeds vs. United States, 255 U. S. 109 .....
Willsman vs. United States, 286 Fed. 852 12
Tenth Amendment to the Constitution of the United States.... 13
Fifth Amendment to the Constitution of the United States..... 21
Sixth Amendment to the Constitution of the United States.... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

NO. 898.

HARRY R. ALSTON, *Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA, *Defendant in Error.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE, ASSIGNMENTS OF ERROR, CERTIFIED QUESTION, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

December 2, 1924, the Grand Jurors of the United States for the Southern District of Iowa, Central Division, returned into the United States District Court at Des Moines, Iowa, a certain indictment, in three counts, against the above named Plaintiff in Error, entitled, "United States of America, Plaintiff, vs. Harry R. Alston, Defendant, No. 3218 Criminal." (Rec. .)

The first count of said indictment charges that said Harry R. Alston, on or about the 24th day of July, 1924, in the City of Des Moines, County of Polk, State of Iowa, did unlawfully, wilfully and feloniously *purchase opium*, and a

derivative and preparation thereof, to-wit, morphine, from a person or persons to the grand jury unknown, said morphine being in and from certain packages, which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended and known as the Harrison Drug Act, said purchase not coming within any of the exceptions provided in said Act, as amended, contrary, etc.

The second count, in the same language, charges that on the 6th day of October, 1924, at Des Moines, said Harry R. Alston did unlawfully, wilfully and feloniously *purchase opium*, and a derivative and preparation thereof, to-wit, morphine.

The third count, in the same language, charges that on the 6th day of October, 1294, at Des Moines, said Harry R. Alston did unlawfully, wilfully and feloniously *purchase coca leaves* and a derivative and preparation thereof, to-wit, cocaine.

December 2, 1924, in the said United States District Court, before the Honorable Martin J. Wade, District Judge, upon being arraigned upon said indictment, in his own proper person and without counsel, the said Harry R. Alston entered a plea of guilty as charged on said indictment.

December 29, 1924, the said Harry R. Alston was sentenced, on such plea of guilty, to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment; for a term of four years under count two of said indictment, and for a term of four years under count three of the indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one, and that he pay the costs of such prosecution. (Rec. .)

That thereafter, and within six months from and after

such judgment and sentence, the said Harry R. Alston, through his attorneys, Messrs. John B. Boddie and Frans E. Lindquist, filed in the office of the Clerk of said United States District Court, at Des Moines, a Petition for a Writ of Error and Assignments of Error, respectively, upon consideration of which the HONORABLE WILLIAM S. KENYON, Circuit Judge, allowed a Writ of Error from the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, and issued a Citation, which Citation was duly served and filed, and that thereafter the Clerk of said District Court transmitted to the Clerk of said Court of Appeals a Transcript of the Record. (Rec. .)

That thereafter, by leave of said Court of Appeals, the Plaintiff in Error was permitted to file Amended Assignments of Error, assigning the following errors, to-wit:

1.

That said counts one, two and three of said indictment are based on section 1 of Acts of February 24, 1919, and November 23, 1921, being 40 Stat. 1130 and 42 Stat. 299, respectively, making it unlawful for any person to "purchase" any opium, or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in original stamped package or from the original stamped package, such "purchase" not being prohibited by the original Act of December 17, 1914 (commonly known as the Harrison Anti-Narcotic Act), 38 Stat. 785, but that the said Acts of February 24, 1919, and November 23, 1921, respectively, attempting to make it unlawful to "purchase" any such drugs, fixes no penalty for violation thereof.

2.

That the original Act of December 17, 1914, 38 Stat. 785, fixing the punishment for violations of said Act, can not apply to the "purchase" of such drugs, first attempted to be made unlawful by the said Acts of February 24, 1919, and November 23, 1921, as aforesaid.

3.

That the first, second and third counts of said indictment, to which the Plaintiff in Error entered a plea of guilty as charged, do not state facts sufficient to constitute any crime against the laws of the United States of which the United States District Court for the Southern District of Iowa, Central Division, has any jurisdiction, and is violative of the Sixth Amendment to the Constitution of the United States, in that said counts do not inform the Plaintiff in Error of the nature and cause of accusation against him.

4.

That the said Acts of February 24, 1919, and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by it to the States, but such power is reserved to the States respectively and to the people.

5.

That as the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919, and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, on every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919 and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, can not be upheld as a revenue measure.

6.

That by reason of the failure of Congress to fix any pun-

ishment for the "purchase" of such drugs, upon the "purchaser," the United States District Court for the Southern District of Iowa, Central Division, had no power or jurisdiction to impose the judgment and sentence upon the Plaintiff in Error that he be confined in the United States Penitentiary at Leavenworth, Kansas, for a term of four years under count one of the indictment; for a term of four years under count two of the indictment, and for a term of four years under count three of the indictment, the sentences imposed under counts two and three to run concurrently with the sentence imposed under count one of said indictment, and that he pay the costs of the prosecution, and such sentences are null and void, for want of jurisdiction, and the Plaintiff in Error is detained, restrained and deprived of his liberty without due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

That thereafter, on the —— day of November, 1926, the Honorable Kimbrough Stone, the Honorable Arba S. Van Valkenburgh, and the Honorable Wilbur F. Booth, Circuit Judges, being the Judges who sat in the United States Circuit Court of Appeals for the Eighth Circuit on the hearing of said cause, prepared and transmitted to this Honorable Court the following certified question, to-wit: (Page 6-8

That thereafter, the Plaintiff in Error filed his application for reduction of bail and for release on his own recognizance, which application was by the United States, Circuit Court of Appeals denied. (Rec. .)

That thereafter, on the 7th day of March, 1927, the motion to advance was by this Court sustained; the Plaintiff in Error was permitted to prosecute his case as a poor person; the case was set for argument on April 11, 1927, the said Circuit Court of Appeals directed to transmit a certified copy of the entire record.

United States Circuit Court of Appeals.
Eighth Circuit.
No. 7122—September Term, A. D. 1926.

Harry R. Alston, Plaintiff in Error, vs. United States of America, Defendant in Error.	In Error to the District Court of the United States for the Southern District of Iowa.

Messrs. John B. Boddie and Frans E. Linquist for Plaintiff in Error.

Hon. Ross R. Mowry, United States Attorney, Mr. Ray C. Fountain, Assistant United States Attorney, and Mr. Frank F. Wilson, Assistant United States Attorney, for Defendant in Error.

Before Stone, Van Valkenburgh and Booth, Circuit Judges.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

That the second day of December, 1924, an indictment was returned charging Harry R. Alston with a violation of the Act of December 17, 1914 (38 Stat. 785), as amended by the Acts of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006), and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), in that he had purchased morphine (a derivative of opium) and cocaine (a derivative of coca leaves) in packages not bearing and having affixed appropriate tax paid stamps as required by the Act as thus amended.

To that indictment, Alston entered a plea of guilty upon which he was adjudged guilty and sentenced to imprisonment for a term of four years

Within due time thereafter, Alston sued out a Writ of Error from the above judgment. Among the Assignments of Errors are the following:

"Fourth.

That the said Acts of February 24, 1919, and November 23, 1921, respectively, in so far as the said Acts attempt to make it a crime to "purchase" narcotic drugs, is violative of the Tenth Amendment to the Constitution of the United States, in that such power is not delegated to the United States by the Constitution of the United States, nor prohibited by its (it) to the States, but such power is reserved to the States respectively and to the people.

"Fifth.

That the "purchaser" of such narcotic drugs referred to in said Acts of February 24, 1919 and November 23, 1921, respectively, is not required to register and pay a special tax, as required by the Act of December 17, 1914, upon every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, the said Acts of February 24, 1919, and November 23, 1921, so far as the same pertains to "purchaser" of such drugs, can not be upheld as a revenue measure."

Plaintiff in error presents to this Court the contention that the Congress was without Constitutional authority to enact the above legislation making the purchase of the designated narcotics unlawful. The basis of this contention is that such a prohibition is an exercise of police power; that such character of power is vested in the several States exclusively by the Constitution of the United States; and that the above enactments can not be sustained as an exercise of the revenue power of the National Government because they are not revenue measures but are purely police measures.

This Court has, in numerous cases heretofore, proceeded upon the assumption that the validity of the above Congressional enactments had been sustained by the Supreme Court. However, in the recent case of United States vs. Daugherty, (269 U. S. 360) the Court makes use of the language following:

"The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in United States vs. Doremus, 249 U. S., 86, was not raised below and has not been again considered. The doctrine approved in Hammer vs. Dagenhart, 247 U. S., 251; Child Labor Tax Case, 259 U. S., 20; Hill vs. Wallace, 259 U. S., 44, 67; and Linder vs. United States, 268 U. S., 5, may necessitate a review of that question if hereafter properly presented."

In view of the above expression of the Supreme Court, this Court is doubtful of its duty and desires the instruction of the Supreme Court upon the following question, a decision of which is indispensable to a determination of this case before it and to the proper discharge of its duties herein.

Question I. Are the Acts of December 17, 1914 (38 Stat. 785), of February 24, 1919 (40 Stat. 1057, 1130, sec. 1006), and of November 23, 1921 (42 Stat. 227, 298, sec. 1005), declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?

KIMBROUGH STONE,
United States Circuit Judge.
ARBA S. VAN VALKENBURGH,
United States Circuit Judge.
WILBUR F. BOOTH,
United States Circuit Judge.

Being the Judges who sat in the Circuit Court of Appeals, on the hearing of the case. (Rec. .)

ARGUMENT.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Honorable Associate Justices of the Honorable The Supreme Court of the United States.

I.

NO PENALTY ON PURCHASER.

Section 8 of Article 1 of the Constitution of the United States provides:

> "The Congress shall have power to lay and collect taxes, duties, imports, and excises. * * * but all duties, imports, and excises shall be uniform through the United States."

Section 1 of the Harrison Anti-Narcotic Act, approved December 17, 1914, provides:

> "On and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, shall register with the collector of Internal Revenue of the district his name or style, place of business, and place or places where such business is to be carried on. * * * It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section."

Section 9 of said Act provides that:

> "Any person who violates or fails to comply with any of the requirements of this Act shall on conviction

be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the Court."

We will admit, for the purpose of this argument, that Congress had the power, under the terms and conditions of section 8 of Article 1 aforesaid, to enact section 1 of the Act of December 17, 1914, and to prescribe punishment for violation thereof.

Section 335 of the Criminal Code, being section 541 of Mason's Code, provides:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It certainly can not be contended that the original Act of December 17, 1914, makes it unlawful to purchase any such narcotic drugs, or fixes any punishment upon the purchaser.

By the Act of February 24, 1919 (40 Stat. 1130), however, Congress sought also to make the "purchaser" of narcotic drugs a violator of the law, as follows:

> "It shall be unlawful for any person to *purchase* sell, dispense, or distribute any of the aforesaid drugs, except in the original stamped package or from the original stamped package."

By Act of November 23, 1921 (42 Stat. 49), the Act of February 24, 1919, *supra*, was reenacted.

Congress failed, however, to designate whether the violation of said Acts should be a felony or a misdemeanor, or to prescribe any punishment upon the "purchaser."

In case of Carroll vs. United States, 267 U. S. 132, Your Honors properly held "That Congress may exercise a relatively wide discretion in classifying particular offenses as felonies and misdemeanors." Judge Wade imposed sentences as for felonies, although the Acts aforesaid do not

specify whether the violator thereof shall be guilty of a felony or a misdemeanor.

In Connally, Commissioner of Labor vs. General Construction Company (January 4, 1926), 46 Sup. Ct. Rep., 126, Mr. Justice Sutherland, at l. c. 127 said:

> (1) "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

It is true that in case of United States vs. Wong Sing, 260 U. S., 18, Mr. Chief Justice Taft held that under the Revenue Act of February 24, 1919, C. 18, Section 1006 (40 Stat. 1130), in order that the person may be liable criminally as a "purchaser" of narcotic drugs it is not necessary that he be of the class who must register and pay the special tax. In that case, however, no appearance was made by Wong Sing, nor was the point raised that the Act of Congress fixes no penalty, so that case is no criterion.

Now, by all process of reasoning, if the "purchaser" of narcotic drugs is neither required to register or pay a tax, how can it be contended that Congress has any authority to make it a criminal offense to "purchase" narcotics?

It is also true that in Stubbs vs. United States, 1 Fed. (2d) 837, the United States Circuit Court of Appeals for the Ninth Circuit held that violation of Act February 24, 1919, is an indictable offense, though Statute imposes no penalty. (Citing numerous cases.) We are unable to find, however, that any such rule was laid down in any of the cases cited.

It is also true that in case of Willsman vs. United States, 286 Fed. 852, the United States Circuit Court of Appeals for the Eighth Circuit affirmed a judgment and sentence imposed upon the "purchaser." In that case, however, the point was not raised that the said Acts do not prescribe any penalty upon the "purchaser."

In the recent case of Reese vs. United States, 14 Fed. (2d) 606, the United States Circuit Court of Appeals for the Sixth Circuit held that said Amendment of February 24, 1919, and November 23, 1921, to be integral part of the original Act of December 17, 1914, and penalties provided in section 9 apply thereto. Mr. Reese acted as his own attorney. He applied to Your Honors for a writ of certiorari, which was denied.

We are still unable to understand how the punishment prescribed for violation of the Act of December 17, 1914, can apply to a "purchaser" of narcotic drugs, first attempted to be made a criminal offense by the Acts of February 24, 1919, and November 23, 1921.

In volume 16 Corpus Juris, pages 68 and 69, section 30, we find this rule:

> "*Necessity to Prescribe Penalty.*—It has been held in some of the cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed, or the judgment arrested; or in other words, that a description, definition, and denouncement of acts necessary to constitute a crime does not make the commission of such acts a crime unless a punishment is annexed, for punishment is as necessary to constitute a crime as its definition."

In case of Mossew vs. United States, 266 Fed. 18, the defendant was indicted for violating Act of August 10, 1917 (40 Stat. 286), charging him with making an unjust and unreasonable charge for sugar sold at retail. He pleaded guilty, a fine was imposed by the District Court, which he paid. Thereafter, he sued out a writ of error from the

United States Circuit Court of Appeals for the Second Circuit, on the ground that while section 4 of the said Act made certain acts unlawful, no penalty was prescribed for violation thereof. *Held,*

> "A judgment convicting a defendant of a crime for which there is no statutory authority, although entered on a plea of guilty, and a fine had been paid, is void."
>
> "The Federal Courts have no criminal jurisdiction, except of offenses created by the Act of Congress, and for which the punishment is also prescribed by statute."

Thereafter, Congress amended the Lever Act, (being Act of October 22, 1919) attaching a penalty for violation thereof.

II.

HARRISON ACT UNCONSTITUTIONAL.

The Tenth Amendment to the Constitution of the United States, which is a limitation upon the power of the Government of the United States, declares:

> "THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE."

In order to intelligently argue the constitutionality of the Harrison Act will require that we also quote section 2 of the Act of December 17, 1914, which section has been repeatedly construed by the Courts, keeping constantly in mind that Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government.

Section 2 of said Act of December 17, 1914, provides:

> "It shall be unlawful for any person to sell, barter,

exchange, or give away any of the aforesaid drugs, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given away on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *

"Nothing contained in this action shall apply. * * * (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." * * *

Section 8 provides that it shall be unlawful for any person not registered under the provision of this Act, and who has not paid the special tax, to have in his possession or under his control any of the aforesaid drugs. * * *

The United States Circuit Court of Appeals for the Ninth Circuit in case of Johnson vs. United States, 294 Fed. 753, held that said section is applicable to only such persons as are required to register under section 1 and does not apply to one who is not engaged in any of the prohibited avocations.

In United States vs. Jin Fuey Moy, 241 U. S., 394, the indictment charged a conspiracy with Willie Martin to have in Martin's possession opium and salts. It further alleged that Martin was not registered with the Collector of Internal Revenue of the District, and had not paid a special tax required; that the defendant for the purpose of executing the conspiracy issued to Martin a written prescription for morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not to be given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The District Court quashed the indictment on the ground that the statute did not apply to the case. (225 Fed. 1003.)

Mr. Justice Holmes, in affirming the ruling of the District Court, held that "any person not registered" in sec-

tion 8 can not be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertook to deal—the persons who are required to register by section 1. MR. JUSTICE HUGHES and MR. JUSTICE PITNEY dissented.

In United States vs. Doremus, 249 U. S. 86, the defendant, a licensed and registered physician, was charged with violation of section 2 of Act of December 17, 1914, for unlawfully selling, giving away and distributing five hundred one-sixth grain tablets of heroin without official written order, and selling, dispensing and distributing such tablets not in the course of regular professional practice. The District Court sustained a demurrer to the indictment, for the reason that the Harrison Act is unconstitutional, being only a revenue measure, and an invasion of the police powers reserved to the States. (246 Fed. 958.)

MR. JUSTICE DAY wrote the opinion for the majority of this Court in which he reversed the ruling of the District Court.

MR. CHIEF JUSTICE WHITE wrote the dissenting opinion in which he held that the District Court "correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved powers of the States," in which opinion MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE MCREYNOLDS concurred.

Our Mr. Linquist thereupon filed a petition for rehearing, which was overruled.

In Webb and Goldbaum vs. United States, 249 U. S. 96, Dr. Webb was a practicing physician and Mr. Goldbaum a retail druggist. They were convicted and sentenced on the charge of conspiracy to violate the Harrison Act. The United States Circuit Court of Appeals for the Sixth Circuit certified three questions to this Court.

Our Mr. Lindquist, by leave of court, filed a brief as *Ami-*

cus Curiae in which he quoted from Hammer vs. Dagenhart, 247 U. S., l. c. 273; Hyde vs. State, 131 Tenn. 208; In the matter of Yun Queng, 159 Calif. 508; Meffert vs. The State Board of Medical Registration and Examination, 66 Kan. 710 (certiorari denied 195 U. S. 625), section 1 Chapter 2 of Bierly on Police Power—State and Federal, and Blunt vs. United States (not reported officially) in which the United States Circuit Court of Appeals for the Seventh Circuit held section 2 unconstitutional, in that—"this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the States."

This opinion was concurred in by Circuit Judge Kohlsaat, but he died before the opinion was filed. A petition for a rehearing was filed by the United States Attorney, which must have been sustained after the filing of the opinions in the Doremus and Webb cases in this Court, because the official opinion is not reported.

This Court answered question 1—"Does the first sentence of section 2 of the Harrison Act prohibit retail sales by druggists to persons who have no physician's prescription, who have no order blank therefor and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?"—in the affirmative.

Question 2—"If the answer to question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?" was answered in the negative.

Question 3—"If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?" in the negative.

Mr. Chief Justice White, Mr. Justice McKenna, Mr

JUSTICE VAN DEVANTER, and MR. JUSTICE MCREYNOLDS dissented for the same reasons as in the Doremus case.

In Jin Fuey Moy vs. United States, 254 U. S. 189, the plaintiff in error was indicted, tried and convicted for violating section 2 of the Harrison Act. MR. JUSTICE PITNEY, speaking for this Court, affirmed a judgment and sentence.

In United States vs. Balint et al, 258 U. S. 250, the defendants were charged with violation of the Act of December 17, 1914. The District Court sustained a demurrer and quashed the indictment. MR. CHIEF JUSTICE TAFT reversed the ruling of the District Court.

In United States vs. Behrman, 258 U. S. 280, the indictment charged violations of the Harrison Act. The District Court sustained a demurrer to the indictment. MR. JUSTICE DAY, speaking for the majority of this Court, held that the acts charged in said indictment constitute an offense within the meaning of the Harrison Act. MR. JUSTICE HOLMES, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS dissented.

In Linder vs. United States, 268 U. S. 5, the defendant, a licensed and registered physician, was charged with violations of the Harrison Act in that he did knowingly, wilfully and unlawfully sell, barter, and give to Ida Casey a compound, manufacture, and derivative of opium not in pursuance of any written order from her on a form issued for that purpose by the Commissioner of Internal Revenue; that the defendant was a duly licensed physician and registered under the Harrison Act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that she did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to Ida Casey by the defendant or

any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant, that Ida Casey would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving and were adapted for consumption.

Mr. Justice McReynolds, after a careful review of all the previous rulings, reversed and remanded said cause for a new trial, all the Justices concurring, for the reason—

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid and can not be enforced. (Cases cited.)
>
> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government." * * *
>
> "The narcotic law is essentially a revenue measure and its provisions must be applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner has done anything falling within definite in-

> hibitions or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."

In the subsequent case of Boyd vs. United States, 46 Supreme Court Reports 442, the indictment contained thirteen counts charging violations of section 2 of the Harrison Act. Counsel for Dr. Boyd, for some unaccountable reason, did not attack the constitutionality of the Harrison Act. The case was submitted to the jury on the question whether Dr. Boyd issued the prescription in good faith, in the course of his professional practice. He was convicted on six and acquitted on seven counts of the indictment. The United States Circuit Court of Appeals for the Fifth Circuit, affirmed the conviction.

Mr. Justice Van Devanter, very properly affirmed the judgment and sentence upon Dr. Boyd, no constitutional questions having been raised.

That it is the duty of Your Honors to declare the Harrison Act, or any other Act in contravention of the Constitution of the United States null and void, is clearly settled in case of Adkins et al, Minimum Wage Board of the District of Columbia vs. Children's Hospital, 261 U. S. 525, in which Mr. Justice Southerland at l. c. 544, said:

> "But if by clear and indubitable demonstration, a statute is opposed to the Constitution, the Court has no choice but to say so, since the Constitution by its own terms is the Supreme Law of the Land, eminating from the people, the repository of ultimate sovereignty under our form of government. A Congressional statute, on the other hand, is the Act of an agency of this sovereign authority and if in conflict with the Constitution, must fall; for that which is not supreme must yield to that which is."

In the subsequent case of United States vs. Daugherty, 46 Supreme Court Reports 156, Your Honors volunteered

the suggestion that the "constitutionality of the Antinarcotic Act, touching which this Court so sharply divided in United States vs. Doremus, was not raised below, and has not been considered. The doctrine approved in Hammer vs. Dagenhart, 247 U. S. 251; Child Labor Tax case, 259 U. S. 20; Hill vs. Wallace, 259 U. S. 44, and Linder vs. United States, 268 U. S. 5, may necessitate a review of that question, if hereafter properly presented."

Although Your Honors in the Adkins case, *supra*, held that it was the duty of this Court to declare any Act of Congress in violation of the Constitution of the United States to be null and void, yet Your Honors failed to say in the Dr. Linder case, *supra*, whether or not the Harrison Act is unconstitutional, although citing a number of previous decisions holding that "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government." Mr. Chief Justice White, Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds held the law unconstitutional in the Doremus and Webb cases, *supra*, and there is nothing to indicate that Mr. Justice Van Devanter and Mr. Justice McReynolds (who are still on the Bench) have changed their previous opinions.

Applying the same reasoning to the case at Bar, we respectfully submit that the sole and only power which Congress has, under section 8 of Article 1 of the Constitution, is to levy a tax on the importation and distribution of such narcotic drugs and to provide penalties for failure to pay such tax upon any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium, or coca leaves or any derivative or preparation thereof, and that the Act of February 24, 1919, and the Act of November 23, 1921, respectively, in so far as they attempt to make it unlawful for any person, other than those mentioned, to "purchase" such narcotic drugs, is in contravention of the Tenth Amendment to the Consti-

tution of the United States, being within the exclusive powers reserved to the States.

We respectfully submit that the plaintiff in error is now and ever since his arrest has been deprived of his liberty contrary to and in violation of the Fifth Amendment to the Constitution of the United States, without due process of law.

In case of State of Minnesota ex rel Whipple vs. Martinson, Sheriff, 256 U. S. 41, this Honorable Court upheld the validity of Chapter 260 of the Laws of Minnesota, 1915.

In conclusion we respectfully submit that if the Harrison Antinarcotic Act is only a revenue measure, and the "purchaser" of narcotic drugs is not required to register and pay a tax, how can it be contended that the Congress has any power or jurisdiction to penalize the "purchases" of such narcotic drugs?

By reason of the premises aforesaid, we respectfully submit that the certified question should be answered in the NEGATIVE, and that the plaintiff in error should be forthwith released from said United States Penitentiary.

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FRANS E. LINDQUIST,
Attorneys for Plaintiff in Error.

WM. H. MASON,
RICHARD O. MASON,
Of Counsel.

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IN THE

Supreme Court of The United States

OCTOBER TERM 1926

No. 898

Certified Question from the Circuit Court of Appeals,
Eighth Circuit

HENRY R. ALSTON,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

INDEX

Page

Statement of the Case 1

Brief and Argument 2

Analysis of Anti-Narcotic Act 9

Invalidity Goes to Whole Act 18

Citations—

Child Labor Tax Case, 259 U. S., 20 8

Flint vs. Stone Tracy Co., 220 U. S., 107 6

Hammer vs. Dagenhart, 247 U. S., 251 8

Hill vs. Wallace, 259 U. S., 44 9

McCray vs. U. S., 195 U. S., 27 5

U. S. vs. Doremus, 249 U. S., 86 7

U. S. vs. Jin Fuey Moy, 241 U. S., 394 16

Veazie Bank vs. Feuno, 8 Wall., 533 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1926

No. 898

Certified Question from the Circuit Court of Appeals, Eighth Circuit

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HENRY R. ALSTON,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

STATEMENT OF THE CASE

As this case is certified here from the Court of Appeals of the Eighth Circuit, desiring instruction on a particular question, we presume that only such statement of the facts is necessary as will inform this Court in a general way of how the matter arises.

Alston was indicted in a District Court in three counts for purchasing narcotics not in a stamped package as required by the amendments of 1919 and 1921 to the so called Harrison Narcotic Act. He pleaded guilty and was sentenced to a term of imprisonment in the Penitentiary at Leavenworth.

Threafter, and "within due time", as certified by the Circuit Court of Appeals, he sued out a writ of error to that

court and his case was there heard and considered. The Court of Appeals was of the opinion that a proper determination of the issues before them involved the question of the constitutionality of the Act of December 17, 1914 known as the Harrison Narcotic Act and of the amendments thereto contained in the Revenue Acts of 1919 and 1921, and thereupon ask an answer to this question:

> "Are the Acts of December 17th, 1914, (38 Stat. L. 785,) of February 24, 1919, (40 Stat. L. 1130,) declaring the purchase of the designated narcotics unlawful under the circumstances set forth in such statutes, valid enactments, as being within the power delegated to the Congress by the Constitution of the United States?"

This brief undertakes to discuss the case only so far as will bear on the question thus certified.

BRIEF AND ARGUMENT

The Circuit Court of Appeals has set out in its certificate the language employed by the Supreme Court in the case of *The United States* vs. *Dougherty*, 269 U. S., 360, and it is unnecessary for us to repeat it here.

The impression produced on the minds of the Judges of the Circuit Court of Appeals by that language, was produced also on the minds of the Bar generally, and on the minds of many trial judges and appellate courts. Taken in connection with the dissent of four Justices of this Court in the case of *Doremus*, 249 U. S., 86, and fortified by the conviction that has long been strongly rooted in the minds even of many prosecuting attorneys, it is impossible for us to understand it otherwise than as amounting at least to an expression of grave doubt on the part of this court.

The language used was, of course, *obiter* in the *Dougherty* case, but so far from weakening its force, that fact emphasizes it and can only do so. Though arising under the Narcotic Act, the question at issue in the *Dougherty* decision had nothing to do with the validity of the act. It related only to the effect of the sentence. We can only understand the Court as intending, in the language quoted, to exclude a conclusion. It was not necessary to say it. It is elementary law that the decision rendered in the *Dougherty* case did not bear at all on the present question. Unless the Supreme Court desired, out of an excess of caution, to save the question, there can have been no reason for what was said.

We, therefore, understand and can only understand the language as an invitation and permission to the Bar to propose a re-examination of the ruling in the *Doremus* case. So understanding it, we shall present our views candidly and with an earnestness and diligence worthy of the magnitude of the question and the far-reaching consequences that may be involved. And, first, we invite attention to the case of

VEAZIE BANK VS. FENNO, 8 Wall., 533.

This case arose under the acts of March 3d, 1865, and July 13th, 1866, imposing a tax on bank notes. In the report of the case it is said that only two questions are made.

1st. Is the tax a direct tax and therefore subject to the rule of apportionment?

2d. It it an impairment of a state franchise?

Both questions were resolved in the negative. Mani-

festly therefore the case has no bearing on the present issue. In Bailey vs. Drexel Furniture Co., 259 U. S., 20, the court states the questions in a slightly different form at page 40, where, after briefly mentioning the first contention, it quotes from the Veazie Bank case itself, as to the second contention, the suggestion that the tax was claimed to be so excessive as to indicate a purpose to destroy the franchises. The difference in the two methods of statement is not material. The Veazie Bank opinion is quoted as saying:

> "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, *for that reason only,* (italics ours), be pronounced contrary to the Constitution."

And this was nothing more than a restatement of the celebrated dictum of Mr. Chief Justice Marshall in McCullough vs. Maryland, (4 Wheat., 431), that "the power to tax involves the power to destroy."

In connection with the ruling it is to be observed that the court added this saying:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power, **** if (it were) exercised for ends inconsistent with the limited grants of power in the Constitution."

And this saying is quoted and adopted in the Child Labor Tax case in 259 U. S., at page 41, and this is the "doctrine" referred to in the language we have quoted from the Daugherty case.

McCRAY VS. U. S., 195 U. S., 27.

In this case, decided in 1903, Congress had imposed a tax of 10 cents a pound on oleomargerine colored in imitation of butter, and the Supreme Court was asked to set it aside on like grounds; that is to say, that it was so excessive as to destroy the business. The court again held that where it was within the power of Congress to levy an excise, the courts could not question the propriety of a lawful tax merely on the ground that it was excessive. The case was discussed and its meaning carefully delimited in the Child Labor Tax case in 259 U. S., at page 42, where it was said to involve the same principle as Veazie Bank vs. Fenno. As to both these cases it was said in the Child Labor Tax case:

> "In neither of these cases did the law objected to on its face, as does the law before us, the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation."

Here again is the "doctrine" referred to in the passage we have herein quoted from the Daugherty case.

What is that doctrine as here stated? It is plainly this, that where a tax is levied for the purpose of enforcing regulations made by Congress, which are state concerns and, therefore, beyond the power of Congress to make, the tax is void and the law violated, notwithstanding the power of Congress to tax, and for the reason that it is not a tax for revenue but a tax to coerce obedience to a law that Congress had no power to enact.

And it will be well here to recall that, in the McCray case itself, the court said:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

FLINT VS. STONE TRACY CO., 220 U. S., 107.

This case involved the corporation excise tax. It raised the same question that was decided in Veazie Bank vs. Fenno, and was decided the same way. Of it the court said in The Child Labor Tax case:

> "There was not in that case the slightest doubt that the tax was a tax, and a tax for revenue: but it was attacked on the ground that such a tax could be made excessive, and thus used by Congress to destroy the existence of state corporations."

Thereupon, observing that the court gave the same answer as was given in the cases of the Veazie Bank and McCray, it was said,

> "It is not so strong an authority for the government's contention as they are."

In fact, the tax was so obviously a legitimate excise, with no concealed purpose, that the case is hardly of importance enough to refer to, and is only mentioned here because it was relied on by the Government in the Child Labor Tax Case and discussed by the Court in that opinion.

THE DOREMUS CASE, 249 U. S., 86.

Because the soundness of the Doremus case is the very question here, and because we understand that we are at liberty to discuss it *de novo*, we do not here give any special consideration to what was there said. Let it be noted, however, that, although it was there held that the act was valid, four justices dissented on the ground that the act invaded the reserved powers of the states. And examination of what was ruled, as well as what was said of it in the Child Labor case, leaves it exceedingly doubtful whether the full question now for consideration was before the court at all.

DISCUSSION OF THE FOUR CASES NAMED.

No doubt there are other decisions, many of them, that deal with the taxing powers of Congress. But these are the principal cases and go further in the direction of sustaining the principle which we say was involved in the Narcotic Act than any others. To those who have not given them a critical examination they have given the casual impression that they amount to a holding that Congress can accomplish any purpose under the guise of a tax. The most casual study, however, shows such is not their meaning, and that even these cases themselves, in language we have quoted above, clearly foreshadow the later holdings that began in the Dagenhart case, and which we are invoking here, to the effect that it is not competent for Congress to exercise the powers and functions of a state, and enforce its will to do so under a pretext of taxation.

We turn, therefore, now to those later cases wherein the court not only refused to sanction such encroachments, but deliberately made it clear that they will not and can not be

permitted. And the first of these is

HAMMER VS. DAGENHART, 247 U. S., 251.

This was the case in which Congress, under the claim of regulating commerce among the several states, prohibited the shipment from state to state of goods produced by child labor or in a factory where child labor was employed.

It would be useless to pursue in detail the reasoning of the court. It will be sufficient here to quote as follows:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." Pages 273 and 274.

And the court added to this

> "The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states by the 10th Amendment to th Ceonstitution."

From the Veazie Bank case and the McCray case we quoted language announcing this "doctrine" in the abstract. Here we have it in the concrete, and this is the very "doctrine" referred to in what we quoted from the Dougherty case. It is obviously unnecessary to discuss the case more fully.

THE CHILD LABOR TAX CASE, 259 U. S., 20.

The court having held that Congress could not interfere

with local policies or control the states by using its commerce power to coerce those policies, the Congress attempted to do exactly the same thing by the use of the taxing power. In the resultant litigation the court said that the case can not be distinguished from Hammer vs. Dagenhart, and that Congress was now undertaking in the name of a tax to control the policies of the state, an attempt that *"must be equally futile."*

HILL VS. WALLACE, 259 U. S., 44.

This was the Grain Futures Act. It was conceded that future trading on an exchange was not interstate commerce. It followed that Congress could not control or regulate it. Therefore, when the act imposed a tax upon all grain sold in that way, and exempted from its operation all who would comply with regulations prescribed by Congress, but which Congress had no right to prescribe, the case fell, of course, within the condemnation of the Child Labor Tax case. The result was inevitable and the "doctrine" was again repeated.

LINDER VS. THE UNITED STATES, 268 U. S., 5.

The importance of the Linder case does not arise so much from the fact that it grew out of the same act now considered, as it does from this, that it tersely and clearly formulates and states the "doctrine" referred to in the Dougherty case.

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government."

ANALYSIS OF THE ANTI-NARCOTIC ACT.

The Harrison Act is much more clearly within the "doc-

trine" in question than the other cases cited. For it does not merely, as they did, prescribe "detailed specifications of a regulation of a state concern and business," and seek, as they did, "to promote the efficacy of such regulation" by taxing those who will not comply, but, going far beyond such scheme, it imposes a tax and punishes those who do not pay it, and yet in terms *forbids the right to pay it.*

In the Child Labor Tax case and in the Grain Futures case, the law at least made it possible to pay the tax and thereby escape the penalty. In the Narcotic Act it imposes the penalty where the tax is not paid, but forbids the payment.

Passing by, for the present, certain specific infirmities in the act, we invite attention first to the chief features of its general scheme, and we can not do so better than by reducing its provisions to their simplest terms. Leaving out all verbal repetitions and multiplications of words, and all provisions that do not affect the principle involved, here is the scheme of the act under which, for more than a decade, the courts of the United States have been called upon, in countless cases, to deal with evils that are committed by our system of government to the exclusive control of the several states.

> Sec. 1. Every person who deals in, dispenses, or sells narcotics shall register with the Collector of Internal Revenue his name and place of business, and pay a special tax of one dollar per annum.
>
> Sec. 2. It shall be unlawful for any person to sell narcotics except in pursuance of a written order by the buyer on a blank form issued by the Commissioner of Internal Revenue and sold by the Collector at 1 cent each, but the collectors shall not sell such form to any

person except those who have registered and paid the special tax.

The scheme of the act is obvious. It needs nothing but its own terms to reveal its purpose. The prohibition it involves is most desirable. The evil it is aimed at is most grave. But it is not a matter for Congress. It is as much a matter for the states to regulate as were the evils of intoxicating liquors.

The Volstead Act was impossible until there was a constitutional amendment. But, if the Harrison Act is valid, why was it necessary to amend the Constitution in order to prohibit intoxicants? Why could not Congress have enacted as follows?

Sec. 1. No person shall sell intoxicating liquors to an habitual drinker unless such drinker has registered with the Collector of Internal Revenue and paid a tax of one dollar.

Sec. 2. No habitual drinker shall be permitted to register and pay the tax.

We have no spirit of levity or purpose to engage in ridicule in suggesting the following supposititious law, but present it as being exactly parallel in every respect.

Sec. 1. Every person engaged in the business of selling pistols, safety razors, golf sticks or mustache cups, shall register his name and place of business with the Collector of Internal Revenue and pay a special tax of one dollar.

Sec. 2. No person shall sell pistols, safety razors, golf sticks or mustache cups, except in pursuance of a written order from the buyer on a form issued in blank by the Commissioner of Internal Revenue and sold by the Collector at 1 cent each.

> Sec. 3. The Collector of Internal Revenue shall not sell or furnish these blank forms to anybody except he be a registered dealer who has paid the special tax.

But why resort to so much verbiage? It would be a shorter and simpler plan in dealing either with whiskey or narcotics, and would accomplish exactly the same result, to write the law thus:

> Sec. 1. No person shall sell either whiskey or narcotics unless he has registered with the Collector of Internal Revenue and has paid a special tax, and shall not sell to any person who is not also registered, and no person shall be permitted to register or pay the tax except regular dealers in such goods.

If the present narcotic act is valid, such an act as is here suggested would be valid also, and no amendment to the Constitution would be necessary.

But why resort to indirection? It would be far shorter and simpler to say:

> "The buying and selling of whiskey and narcotics shall be held and deemed to be unlawful, and any person so engaged shall be punished by fine and imprisonment."

In short, we submit that it is the manifest purpose of the Act to prohibit the sale or furnishing of narcotics to anybody except dealers (subject, of course, to a few cases, closely guarded, where physicians dispense or prescribe it). That this purpose is accomplished under the guise of a tax comes to nothing. Congress, of course, has the authority to lay and collect excises for the purpose of paying the public debt and of promoting the general welfare within its

authorized powers, but it has no such power for the purposes intended by this act. And such is the clear declaration of the Supreme Court in the Child Labor Tax case and in Hill vs. Wallace.

It is quite true that, in those cases, the court pointed, as evidence of the purpose in view, to the excessive rate of the tax, and that in the present case the tax goes to the other extreme and, instead of being excessive, is absurdly small.

But the tax was not held invalid in those cases because of its excessiveness. In Veazie Bank vs. Fenno, in the McCray case, and in Flint vs. Stone Tracy Co. it was distinctly ruled that the courts could not condemn a tax for being too large. And the court did not, either in the Child Labor case, or in the Grain Futures case, hold the tax illegal because it was excessive. The excessiveness was pointed to as evidence, and not as a vice. *It was evidence that the tax was not intended to be collected at all.* It was a severe penalty imposed on those who would not comply with unauthorized regulations in the tax act.

In the Narcotic case the smallness of the tax is not a vice. But it is evidence of what the real purpose of the act was. It was not, like the other cases, intended to discourage the thing that it taxed. It was worse. It did not say to the user of narcotics, "You shall pay a heavy tax if you do the things we are seeking to prevent." It approached the subject with cynical directness, and said, in effect, "You shall not do what we are seeking to prevent, unless you pay a ridiculously small tax, and you shall not pay the tax."

It is hradly possible to imagine a case in which a statute more obviously carries its death wound in its own face.

OTHER INFIRMITIES IN THE ACT.

The exceptions provided in Section 2 are elusive in character. By the first it is provided that the act shall not apply to the direct dispensing of the drug by a physician to his patient, provided the physician keeps a record thereof. This exception has always been to the writer a puzzling thing. It contains no affirmative legislation. It neither commands nor prohibits. It simply excepts, and excepts upon a condition. The condition is not a command. If there is any prohibition here at all, directed to physicians, the prohibition is not in the exception (a). To find it we must go back to the beginning of Section 2 and find the prohibition in the words "sell, barter, exchange or give away." And this raises the interesting question as to how one would classify the act of a physician in ministering to his patient. If he administers castor oil, we could hardly say that he is "bartering" or "exchanging." But is he "selling" it? Is he "giving" it away? If he renders a physician's bill for his services, does this constitute his act in administering the oil a selling? If he renders no bill at all, is he giving it away? It seems not unreasonable to say that his act is not described by either of the words in the prohibition. It is a "dispensing." If I serve my client for a fee, and in the course of my work I use my paper and my stamps, am I selling them to my client or giving them away?

To this it will be replied that Section 1 uses the word "dispense." Quite true; but it does not prohibit the "dispensing." It merely requires the "dispenser" to register. Let us suppose, then, that a physician, intending to "dispense," registers and pays the tax. Suppose, then, that he dispenses to a delirious patient a quarter of a grain of morphine. What part of the act has he broken? Clearly none,

unless the merciful act of "dispensing" can be said to be either selling or giving away. For the exception does not prohibit or command. It does not even require the keeping of the record. That is left optional. He could not be indicted for failing to keep this record. That requirement is a privilege that, if exercised, excuses the selling.

Perhaps it may be said that this line of argument is captious, or that, at best, it is addressed to the meannig of the act, rather than to its validity. If we had nothing else to go on but the act itself, that would sound like a fair criticism. But we have something else. We know that, in their zeal for its enforcement, the narcotic officers of all grades have put an interpretation on this exception (a), and that the courts have followed it in thousands of cases, under which a physician, duly registered and who has paid the tax, is haled into court for dispensing morphine to a patient without keeping a record thereof, and this, although the act does not forbid the dispensing.

In its practical application this is a clear case of prohibiting a physician from giving his patient a dose or two of morphine without keeping a record of his professional acts. And let it be noted that this has no relation to the enforcement of a tax. There is no tax on that act. The physician, who dispenses must register, must pay a special occupation tax, can get his morphine only on a taxed form. But he has done all these things. What purpose is to be subserved by requiring him to keep a public record of his professional practice? Clearly none.

And yet it will be answered that this record is necessary in order to enable the government to find out what he does with the morphine he purchases under his order forms. To this we reply that that is no concern of the government.

If he registers and pays his tax, and pays for his order forms, what right has the government to ask what he does with his morphine?

In answer to this, we will be referred to this language in the act:

> "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

We agree that the purpose of the requirement that a physician shall keep a record of his dispensing is to provide a means for determining whether this prohibition is violated. By this means the government officers can tell what he does with it and whether he practices medicine in violation of profession ethics or used it otherwise than in a lawful business. But what concern is it to the United States what he does with his morphine? This aids in no way to collect the special tax. There is no tax on the morphine or on the sale of it. It is perfectly clear that the prohibition last quoted is nothing in the world but an attempt to regulate the practice fo medicine and keep morphine away from addicts. Admirable purposes! Desirable ends! But so would it be to prevent and punish murder, burglaries and arson, except that these are matters reserved to the control of the states.

THE CASE OF JIN FUEY MOY.

Without taxing the patience of the court by an elaborate discussion of exception (b) to section 2 of the act, which is

equally as elusive in meaning as exception (a), we observe that the reasoning in the case of Jin Fuey Moy, 225 F. R., 1003 and 241 U. S., 394, goes far to sustain our contention by its analogies.

The Supreme Court did not in terms say that Section 8, if construed to apply to all persons, would be unconstitutional, but it did say that, so construed, it would "strain the powers of Congress almost if not quite to the breaking point," and ascribes to the Attorney General the remarkable admission that, in passing the act, Congress was seeking, because of the existence of a treaty on the subject, to do exactly what we here contend it was doing, seeking to regulate the traffic, and that, for this reason, Congress

> "gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature."

Jin Fuey Moy Case, 241 U. S., 401.

The official admission is significant, and the Attorney General manifestly was of the opinion that the act would be open to our complaint if it were not for the fact that it could be and was justified under the treaty power, a straw grasped at by the Government but snatched away by the court in this language,

> "The statute does not purport to be in execution of a treaty, but calls itself a registration and taxing act. The provision before us was not required by the Opium Convention."

Though the court thus denied to the Government the consolation sought, it did avoid holding Section 8 unconsti-

tutional by the ruling that Section 8 was not intended to apply to all persons, but only to those who were required by the act to register and pay the tax. The conclusion is irresistible that, if Section 8 did apply to all persons, it was beyond the power of congress to enact. If this is true, how much more true is it that the whole act being a mere effort to regulate a matter of state police, is void.

Judge Thompson, of the Western District of Pennsylvania, from whose judgment the case was taken in error, was less tender in his expressions and very clearly indicated the view that, construed as applicable to all persons, that act

> "Would perhaps violate the provisions of the Constitution of the United States."

225 Fed. Rep., 1004.

THE INVALIDITY GOES TO THE WHOLE ACT.

It will, of course, be contended that the taxing part of the act, including the requirement of the order forms, is within the power of Congress, and that, if the requirement as to the order forms is valid, the requirement that duplicates be kept for examination is a proper adjunct, useful and necessary in enforcement of the tax.

We desire to discuss the case on that plane of candor that is worthy of the magnitude of the question, and we agree that, if the premise is sound, the conclusion follows.

That is to say, if the act is valid in so far as it requires the use of the forms, the provision is valid that requires their preservation by duplicates.

But we deny the premise.

The principle is elementary and needs no citation of authority, that, where an invalid provision in an act is unconstitutional but is separable, its invalidity does not necessarily affect the entire act. Such we assume would be the case with Section 8. Had that section been construed as applicable to all persons and therefore invalid, it could have easily been separated. It was not only a complete entity in itself and physically disconnected with the balance of the act, but it was, by its very terms, a mere rule of evidence. Its prohibitions could be eliminated without affecting the general scheme.

Quite the reverse is the provision we have chiefly discussed. It is not only interwoven with other matters, but so ingeniously and intricately interwoven as hardly to be discoverable from a mere reading. Not only is it thus interwoven with the revenue features so as not to be capable of physical separation; not only is it so important a feature as to make it impossible for a court to say that Congress would have enacted the law without it; but it is far more than that.

It is the very gist and obvious purpose of the act. Of course a court can not say that Congress would have passed the act without it. It is worse. The courts can and should see and declare that, without it, Congress would never have even considered such an act.

In this connection it is to be recalled that the Child Labor Tax Act was, in terms, declared wholly invalid, and that if the Grain Futures Act was not expressly so declared, the language of the opinion leaves no alternative but to so understand it. Certainly the revenue portions were so de-

clared. And we invite special attention to the fact that, in the Grain Futures Act, Congress had expressly provided that the infirmity of one portion of the act should not invalidate the rest. Commenting on this provision the Supreme Court said that the invalid section "is so interwoven" with the rest "that they can not be separated."

Further pursuing the command of the saving clause, the court said,

> "Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."
>
> *Hill vs. Wallace*, 259 U. S., 70.

SPECIAL CONSIDERATION OF THE AMENDATORY ACTS.

The amendments of 1919 and 1921 were included in the Revenue Acts of those years. Had they appeared there as independent enactments, they might be earnestly supported as *bona fide* excise taxes legitimately imposed in the exercise by Congress of its undoubted power under the first enumerated grant in the Constitution. But they appeared there expressly as amendments to the Act of Dec. 17, 1914. Not only so, but it is reasonably certain that unless the penalty for their violation is to be found in that act, there is no penalty prescribed at all. The indictment and sentence in this case profess no other authority than such as may be found in the Act of 1914.

We take it to be recognized law that where an act of Congress is unconstitutional and void, and must fall for

that reason, it necessarily drags down with it every attachment that is tied to it. An unconstitutional law is no law, and therefore the amendment must fall because there was nothing to amend by.

IN CONCLUSION.

We repeat that the purposes of the Act are good. Possibly its operation has been good, though, after having prosecuted under it for seven years, the writer of this brief gravely doubts whether its effects have not done more harm in further encouraging the tendency of the states toward atrophy in their proper functions, than it has done good by the prevention of narcotic addiction. This is a consideration that may perhaps have no proper place here, either in favor of holding the statute good or holding it bad. Questions of policy have, of course, no proper place in considering matters of constitutional authority. But they do insinuate themselves into the human mind, and in a great matter of a public evil like narcotic addiction, the greatest of intellects may be somewhat beguiled by the magnitude of an evil, even as the most unimportant mind may find its logical processes misled by the thought that the assumption of a power by Congress inevitably tends to make the states evade their burdens.

It is a tempting field of thought, but one which we frankly admit is illogical either way.

What we do say is this, that there are few duties on a court that seem to us more imperative than the duty to pronounce invalid every act of Congress that trespasses beyond the charter of its authority. The curbing of unwarranted efforts after power is just as vital to our institutions as the vindication in all its vigor of the authority that is delegated.

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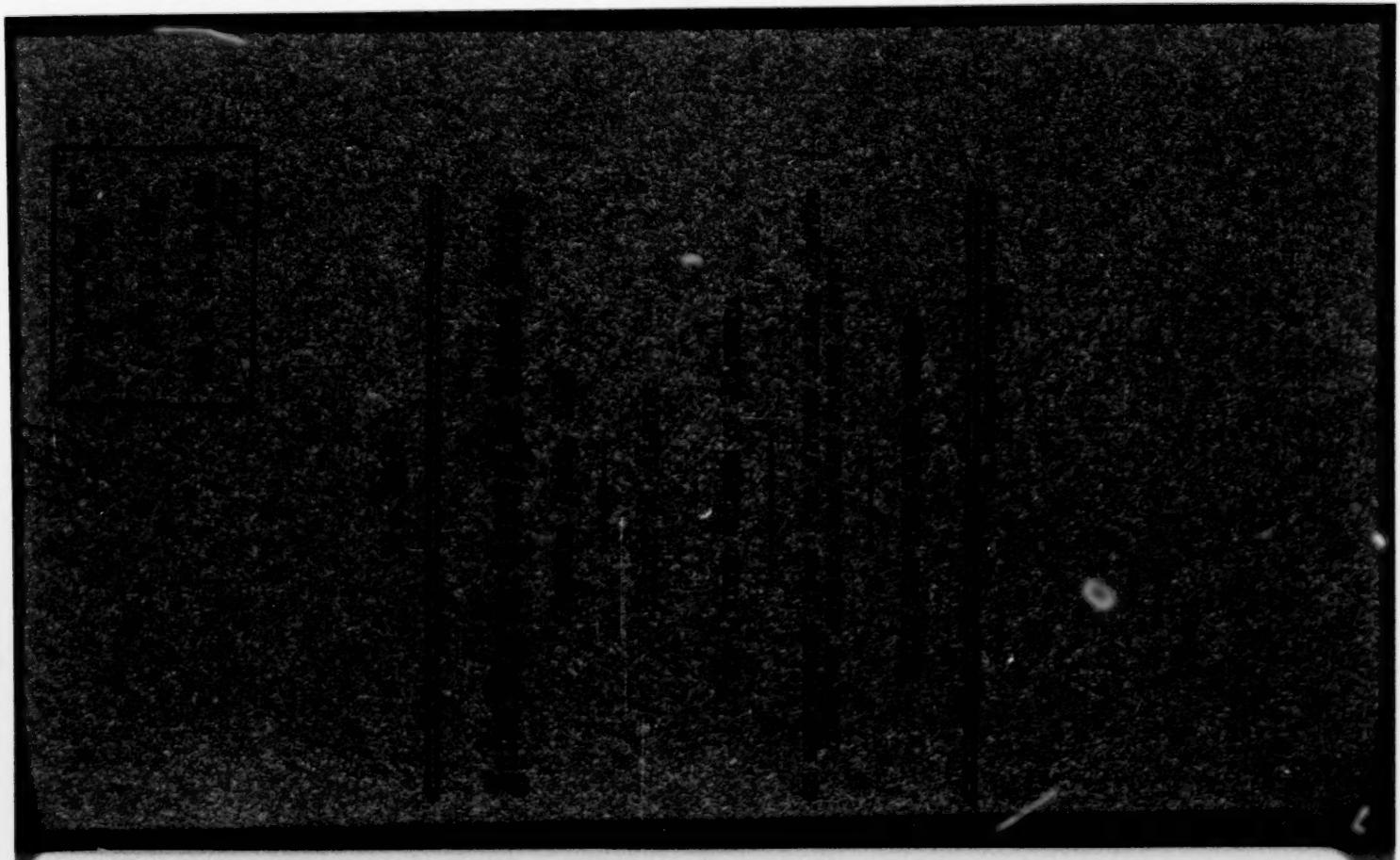

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question presented	2
Statement	3
Statutes involved	5
Summary of argument	5
Argument:	
I. The provisions of the Harrison Act imposing a tax of 1 cent per ounce on the drug and making it an offense to purchase from an unstamped package are valid. The provisions of section 2, the validity of which has been heretofore questioned, are severable	8
II. If the decision in the Doremus case respecting the validity of section 2 of the act is to be reexamined the court should consider not only the adequacy of the reasons which it there gave to support its conclusions but such further reasons as may be adduced in support of the validity of the statute	22
Conclusion	32
Appendix	33

CITATIONS

Cases:	
Child Labor Tax Case, 259 U. S. 20	18
El Paso & N. E. Ry. Co. v. *Gutierrez*, 215 U. S. 87	19
Gunn v. *United States*, 271 U. S. 661	16
Hammer v. *Dagenhart*, 247 U. S. 251	17
Hill v. *Wallace*, 259 U. S. 44	18
Jin Fuey Moy v. *United States*, 254 U. S.	13
Keller v. *United States*, 213 U. S. 138	21
Linder v. *United States*, 268 U. S. 5	14, 18
Missouri v. *Holland*, 252 U. S. 416	29, 30
Trusler v. *Crooks*, 269 U. S. 475	18
United States v. *Balint*, 258 U. S. 250	13
United States v. *Behrman*, 258 U. S. 280	14
United States v. *Daugherty*, 269 U. S. 360	15, 16, 17
United States v. *Doremus*, 249 U. S. 86	6, 12, 13, 24
United States v. *Jin Fuey Moy*, 241 U. S. 394	11, 13, 26, 29
United States v. *McCullagh*, 221 Fed. 288	29

Cases—Continued.	Page
United States v. *Shauver*, 214 Fed. 154	29
United States v. *Wong Sing*, 260 U. S. 18	14
Webb v. *United States*, 249 U. S. 96	13
Statutes:	
Narcotic drugs import and export act of February 9, 1909, ch. 100, 35 Stat. 614, as amended by the act of January 17, 1914, ch. 9, 38 Stat. 275, and as amended by the act of May 26, 1922, ch. 202, 42 Stat. 596	5, 50
Harrison Narcotic Act of December 17, 1914, ch. 1, 38 Stat. 785	5, 33
Revenue act of 1918, ch. 18, sec. 1006, 40 Stat. 1057, 1130, amending the Harrison Act	5, 44
Judicial Code, sec. 239, as amended by the act of February 13, 1925, ch. 229, 43 Stat. 936, 938	1, 2
International Opium Convention signed at The Hague January 23, 1912, 38 Stat. pt. 2, p. 1929	5, 27, 57
Miscellaneous:	
Presidential message to the Senate of February 21, 1910	31, 86
Foreign relations, 1914, pp. 931, 939; 1915, pp. 1101, 1311	28
Treaties, conventions, international acts, protocols, and agreements between the United States and other powers, 1910–1923 (Sen. Doc. No. 348, 67th Cong., 4th sess., p. 3025)	28
Annual report of Commissioner of Internal Revenue for fiscal year ending June 30, 1926	18
Government report on the traffic in opium and other dangerous drugs for the year ending June 30, 1926	27, 70

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 898

HARRY R. ALSTON

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

As the Circuit Court of Appeals certified the case it rendered no opinion and the District Court did not have occasion to do so.

JURISDICTION

The case came here originally on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. (R. 1.) This section provides that this Court either may give binding instructions on the question certified "or may require that the entire record in the cause be sent

up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal." This Court, noticing, no doubt, that the questions certified were much broader than the questions actually involved as disclosed by the statement accompanying the certificate, made an order (R. 25) directing that the whole record be sent up.

The case is here under the above-quoted provisions of Section 239 for decision of the whole matter in controversy.

THE QUESTION PRESENTED

The question presented is whether the provisions of Section 1 of the Harrison Narcotic Act imposing an internal-revenue tax on narcotic drugs at the rate of one cent per ounce, to be represented by appropriate stamps, and making it an offense to purchase drugs except in or from the original stamped package, are constitutional. In passing on this question it must be determined whether the provisions of the Act referred to are severable from other provisions in Section 2, the validity of which has been questioned, and if not, whether there is any invalid provision in any other part of the statute the invalidity of which renders the entire Act unconstitutional.

The plaintiff in error in addition argues that no penalty has been provided for violation of the

stamp-tax provisions; but this point is so clearly untenable we submit it without argument.

STATEMENT

Although the case reached this Court on certificate, the entire record has been sent up in obedience to the order entered March 7, 1927. (R. 25.) It discloses that Alston was indicted in the United States District Court for the Southern District of Iowa December 2, 1924, under an indictment in three counts. (R. 5.) Count 1 charged him with having on July 24, 1924, purchased morphine, "said morphine being in and from certain packages which said packages were not then and there the original stamped packages containing said morphine, and which said packages did not bear and have affixed thereto appropriate taxpaid stamps," as required by the Harrison Act, the purchase not coming within any of the exceptions provided in the Act.

Count 2 charged a similar purchase of morphine from an unstamped package on October 6, 1924.

Count 3 charged the purchase of cocaine on October 6, 1924, from unstamped packages.

Alston was arraigned and pleaded guilty to the charges contained in the indictment. (R. 7.) Thereupon on December 29, 1924, the court entered judgment, imposing a sentence of four years in the penitentiary under Count 1, four years under Count 2, and four years under Count 3, the sentences under Counts 2 and 3 to run concurrently with that

under Count 1. (R. 8.) The record does not disclose any proceedings in the trial court raising any question as to the validity of the indictment. No motion in arrest of judgment was made. Thereupon on June 4, 1925, a writ of error was sued out from the Circuit Court of Appeals for the Eighth Circuit. (R. 8.) In his assignments of error Alston asserted that the judgment upon his plea was contrary to the Fifth Amendment and that he was deprived of his liberty without due process of law, because the District Court had no power or jurisdiction to impose the judgment and sentence for the reason that no penalty had been provided by statute for the offense of purchasing drugs from unstamped packages by the amendment in the Revenue Act of 1918 which had added the stamp-tax provisions to the Harrison Act. (R. 9, 10.)

In August, 1925, he filed in the Court of Appeals a motion for leave to file amended assignments of error, which motion was granted. (R. 12, 17.) In one of the amended assignments of error he contends that the Harrison Act in so far as it attempts to make it a crime to purchase narcotic drugs is a violation of the Tenth Amendment and beyond the power of Congress. (R. 13.) The two assignments of error pressed in his brief in this Court are that no penalty was provided by the amendment to the Harrison Act of February 24, 1919, which added the provision for stamp taxes, and that the Act as a whole is unconstitutional.

STATUTES INVOLVED

The appendix contains (pp. 33–57) a copy of the Harrison Act as originally enacted in December, 1914, c. 1, 38 Stat. 785, and Section 1006 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1130, which amended the original Act; the Narcotic Drugs Import and Export Act, which is the Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275, and as amended by the Act of May 26, 1922, c. 202, 42 Stat. 596. The appendix also contains (pp. 57–70) the International Opium Convention signed at The Hague January 23, 1912 (38 Stat., Pt. 2, 1929.)

SUMMARY OF ARGUMENT

I. The case arises under the provisions of Section 1 of the Harrison Act imposing a stamp tax on drugs and making it an offense to sell or buy drugs in or from an unstamped package. These provisions of the Act are clearly valid under the power to levy taxes. They are intended to produce revenue; they actually produce substantial revenue; they do not have the effect of prohibiting transactions; the taxes are not imposed as penalties for infraction of law, and there are no discriminating provisions to indicate that by colorable use of the taxing power Congress is attempting to invade the police power of the States.

The provisions of Section 2 relating to order forms and possession of drugs and which have the effect, among other things, of preventing indi-

viduals, not registered physicians or legitimate dealers who have paid the required occupation taxes, from purchasing and possessing the drug other than by means of medical prescriptions, which provisions are the only ones heretofore seriously questioned, are readily severable, and the remainder of the Act may and should be sustained regardless of their validity.

The decisions of this Court dealing with this statute clearly indicate that it has never questioned the validity of the stamp and occupation tax provisions or the propriety of sustaining these parts of the statute.

II. The Court may not find it necessary in this case to reconsider the decision in the *Doremus case,* sustaining the assailed provisions of Section 2, but if it does, additional considerations in support of that decision are available.

The order-form provisions, aside from the one which prohibits sale of order forms to other than registered physicians and dealers, are clearly valid as tending to enforce the stamp and occupation tax provisions. In so far as they prevent the purchase by an unregistered individual of quantities of the drug exceeding his personal requirements, they are valid as enforcing the occupation tax on dealers, because such a purchase is only made by one who proposes to sell the drug. To the same extent the order form provisions may be sustained as in aid of the Narcotic Drugs Import and Export Act, which prohibits the importation of the drugs in excess of

an amount required for medicinal and legitimate use, as they trace the use to which the imports are devoted and operate to disclose smuggling.

In addition the Opium Convention required the United States to enact such legislation. The public records show that the Harrison Act as amended has the double purpose of raising revenue and executing the treaty, and was enacted after the treaty had been signed, and the Act, by its terms, took effect after the treaty became operative. The public records show that no opium or coca leaves are produced in the United States, but all materials from which opium, morphine, or cocaine are derived are imported. The order form and possession clauses of Section 2 of the Harrison Act may not be held invalid without at the same time striking down the Opium Convention as beyond the treaty power. The narcotic problem has been historically proved to be an international problem, unsolvable except by general international agreement. If the narcotic problem is a proper subject of international agreement and the domestic legislation stipulated for in it is germane and reasonably required to make the international agreement effective, the treaty and the laws executing it are valid. That this is the case has been declared by the President and the Senate in negotiating and ratifying the treaty, by Congress in enacting this legislation to execute it, and by high Executive officials of the United States who have studied the problem.

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ARGUMENT

I

THE PROVISIONS OF THE HARRISON ACT IMPOSING A TAX OF ONE CENT PER OUNCE ON THE DRUG AND MAKING IT AN OFFENSE TO PURCHASE FROM AN UNSTAMPED PACKAGE ARE VALID. THE PROVISIONS OF SECTION 2, THE VALIDITY OF WHICH HAS BEEN HERETOFORE QUESTIONED, ARE SEVERABLE

Since the plaintiff in error was convicted under an indictment charging only the purchase from an unstamped package, the question primarily presented is whether the provisions of the Harrison Act imposing a tax of one cent per ounce on the drug and requiring stamps to be affixed to the packages as evidence of payment of the tax and forbidding the sale or purchase of the drug in or from unstamped packages are valid as an exercise of the taxing power.

The Harrison Act as originally enacted December 17, 1914, contained no provision for stamp taxes on the drugs, and Section 1 imposed only an occupation tax or license tax on those engaged in the business of producing, importing, manufacturing, or dealing in drugs at the rate of $1.00 per annum. (See p. 33, Appendix.) The Revenue Act of 1918 amended the Harrison Act, among other respects, by adding a provision imposing a tax of one cent per ounce on the drugs, making it an offense to purchase or sell in or from an unstamped package, and, in lieu of the tax of $1.00 per year on all per-

sons importing, manufacturing or dealing in the drugs, imposing a tax of $24 per annum on importers, manufacturers, producers, and compounders, $12 per annum on wholesale dealers, $6 per annum on retail dealers, and $3 per annum on physicians and surgeons dispensing drugs in the course of their practice.

The Act as it now stands and under which the plaintiff in error was convicted (Appendix, page 44) provides in Section 1 that every person who imports, manufactures, produces, compounds, sells or dispenses opium or coca leaves or any compound thereof, shall annually register with the Collector of Internal Revenue and pay occupation taxes, the importers, manufacturers, producers and compounders to pay $24 per annum, wholesale dealers $12 per annum, retail dealers $6 per annum, and physicians, dentists, etc., $3 per annum. It is made unlawful for any one to import, produce or deal in, sell or dispense the drugs without having registered and paid the occupation tax. The Act imposes upon opium, coca leaves, or compounds or derivatives thereof produced in or imported into the United States and sold or removed for consumption or sale "an internal-revenue tax of 1 cent per ounce," to be paid by the importer, manufacturer, producer, or compounder. The tax is to be represented by stamps provided by the Commissioner of Internal Revenue, to be affixed to the bottles or containers, and it is in addition to any import duty. The Act

then provides "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package" with exception of the case of dispensing of the drug under prescription for legitimate medical uses. Section 2 makes it unlawful for any person to sell drugs except in pursuance of a written order on a form to be issued for that purpose by the Commissioner of Internal Revenue, the person receiving the order to preserve it for two years and the person giving such an order to retain a duplicate thereof for a like period.

An exception to this requirement is the case of the dispensing of drugs by a physician in the course of his professional practice, and there are other exceptions not here material. Section 2 then provides that these order forms shall be furnished by the Commissioner at a cost of not exceeding $1.00 per hundred to those persons who have registered and paid the special tax, and that "no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district." It is then provided that "it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

The only provisions of the Harrison Act in its original form or as amended the validity of which has ever been seriously questioned are those found in Section 2, which have the effect—through the prohibition against sale to persons not producing order forms or physicians' prescriptions, and through the provision that no one shall be supplied with an order form except a registered physician or registered dealer or importer—of prohibiting purchase or possession by one who is not an importer, dealer, or physician and obtains no medical prescription.

There is nothing in Section 1, and particularly in the provisions relating to stamp taxes and purchases or sales from unstamped packages, the validity of which is seriously open to question or has ever been questioned except on the theory that the whole Act must fall if some provision in Section 2 is declared invalid.

An analysis of the decisions of this Court dealing with the Harrison Act discloses nothing casting any doubt on the validity of the stamp-tax provisions.

United States v. *Jin Fuey Moy*, 241 U. S. 394, arose under the original Act of 1914 and the Court construed the provisions of Section 8, making it an offense to have drugs in possession by one unregistered, as relating only to those required to register and pay the occupation tax. Stamp-tax provisions were not in the statute at that time. The Court held that the original Act was a revenue measure.

It discussed to some extent the question whether the Act was in execution of the International Opium Convention.

United States v. *Doremus,* 249 U. S. 86, arose under the original statute and in that case Doremus, a physician duly registered, was charged with having dispensed 500 tablets of heroin, a derivative of opium, not in pursuance of a written order form and not for the treatment of disease in the course of his regular professional practice. That case, therefore, arose under that provision of Section 2, which makes it unlawful to sell or dispense the drugs except on an order form or on a bona fide prescription. The Court sustained this provision of Section 2 as tending to keep the traffic aboveboard and subject to inspection, and as having a direct relation to the enforcement of the revenue provision which then imposed only an occupation tax of $1.00 per annum on importers, manufacturers, and dealers. The dissent of four Justices was on the expressed ground that the Act of Congress, "in so far as it embraced the matters complained of," was beyond the constitutional power of Congress to enact, because "to such extent" the statute was a mere attempt by Congress to exert a power not delegated. The way in which this dissent was expressed indicates that the dissenting Justices considered the questionable provision of Section 2 separable and that other provisions of the Act could be sustained.

In *Webb* v. *United States,* 249 U. S. 96, a physician who had registered as such and paid the occupation tax, was charged under the original Act with conspiring to dispense drugs not in the ordinary course of his professional practice, in collusion with a registered dealer who obtained drugs on order forms. The decision followed that in the *Doremus case.*

The second *Jin Fuey Moy case,* 254 U. S. 189, involved a second consideration of the same charges dealt with in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, and the only question decided on the second writ of error was whether the issuing of a false prescription to one not a bona fide patient was a sale. The Court said that the question of the constitutionality of the Act had been set at rest in the *Doremus case.*

In *United States* v. *Balint,* 258 U. S. 250, Balint was charged with selling the drug not in pursuance of an order form. The only question was whether it was necessary to charge in the indictment that the vendor knew it was a drug he was selling, and the Court held it was not. It said (p. 253):

> The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs.

That case arose under Section 2 of the original Act of 1914.

The case of *United States* v. *Behrman*, 258 U. S. 280, arose under Section 2 of the original Act of 1914, making it an offense to sell drugs except in pursuance of an order on the form furnished by the Commissioner of Internal Revenue. The only question was whether the statement in the indictment that the physician had dispensed large quantities of the drug—150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine at one time to one person—showed that the drugs were not dispensed in the regular course of medical practice.

In *United States* v. *W[illegible]g Sing*, 260 U. S. 18, the second count of the indictment, being the only one before the Court, was based on the amendment effected by the Revenue Act of 1918, and charged the defendant with having purchased drugs not in or from the original stamped package and without having obtained the drugs from a registered dealer. The only question was the construction of the amendment of 1918 respecting stamp taxes. There is nothing in the opinion disclosing any doubt as to the validity of the stamp-tax provision. The Court held that Congress could make it illegal to purchase from an unstamped package as well as to sell from one, and it was immaterial whether the purchaser was registered or not. That appears to have been the first case arising under the stamp-tax provisions.

The case of *Linder* v. *United States*, 268 U. S. 5, arose subsequent to the amendments of 1919 but under the provisions of Section 2, the charge being

that the defendant, a physician, who had registered and paid the occupation tax, had unlawfully sold morphine and cocaine not in pursuance of a written order on a form issued by the Commissioner of Internal Revenue and not in good faith in the course of his professional practice. The quantity was one tablet of morphine and three tablets of cocaine. The Court dealt only with the provisions of Section 2, and said (p. 17):

> And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and can not be enforced.

And in the light of these principles and of the rule that a statute must be construed, if possible, to avoid grave doubts as to its validity, it held that Section 2 of the amended Act should not be construed to make unlawful the dispensing of such a small quantity of drugs to a patient. There is nothing in that opinion or its discussion of the statute which throws any doubt upon the validity of the provisions which have been added to the statute by the Revenue Act of 1918 imposing stamp taxes on the drug and forbidding the purchase or sale except in or from a stamped package.

In *United States* v. *Daugherty*, 269 U. S. 360, the Court said (p. 362):

> The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus*, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44, 67; and *Linder* v. *United States*, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented.

The record in the *Daugherty case* shows that there were three counts in the indictment, all alike, which charged the accused with being a dealer and with having dealt in and dispensed drugs without having registered and paid the special occupation tax required by Section 1, and the indictment in that case was not founded on any provision of the Act the validity of which had previously been seriously assailed except on the theory that the whole Act was invalid.

In *Gunn* v. *United States*, 271 U. S. 661, Gunn filed a petition for certiorari to review a judgment under an indictment, Count 1 of which charged violation of the provisions of Section 1 prohibiting sale from an unstamped package. There were other counts under other sections, but since the sentences were concurrent the judgment could not be set aside unless the provision for the sale from an unstamped package was invalid or the Act was unconstitutional as a whole. Petition for certiorari was opposed by the United States on the

ground that the stamp-tax provisions of the Act were plainly valid, that whatever doubt existed with respect to some provisions of Section 2 the Act as a whole was not invalid, and certiorari was denied.

This review of the cases shows that the Court has never expressed any doubt either in a dissenting or majority opinion with respect to the validity of the provisions of Section 1 in the original Act imposing an occupation tax, or with respect to the validity of the provisions of Section 1 of the amended Act imposing increased occupation taxes and imposing a stamp tax on the drug and making it unlawful to purchase or sell except in or from a stamped package.

Of the cases mentioned in *United States* v. *Daugherty, supra; Hammer* v. *Dagenhart,* 247 U. S. 251, dealing with the Act intended to prevent interstate commerce in the product of child labor, has no bearing on the stamp-tax provisions of Section 1 of the Harrison Act. The principle there announced, that an Act of Congress, the real purpose and effect of which was to regulate child labor, could not be sustained because enacted under the guise of the power to regulate commerce may have some bearing on the question whether the provisions of Section 2 of the Harrison Act, forbidding the sale of order forms except to dealers [and thus preventing persons from obtaining the drug who are not dealers] have a real relation to the tax pro-

visions of the Act or are an invasion of the State's police power, but the case has no bearing on the validity of the stamp-tax provisions of Section 1. The same thing is true of the *Child Labor Tax Case,* 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, 67. *Linder* v. *United States,* 268 U. S. 5, dealing with the Harrison Act, has been discussed above.

The provisions of Section 1 of the Harrison Act as amended, imposing occupation taxes and stamp taxes and forbidding the sale of the drugs except in or from stamp-paid tax packages, are clearly based on an exercise of the taxing power. There is no suggestion about them that Congress is using the taxing power as a subterfuge. The amount of the taxes are moderate.

The case does not resemble *Trusler* v. *Crooks,* 269 U. S. 475, where the amount of the tax on puts and calls, based on the bushels of grain involved, very much exceeded in each transaction the consideration passing between the parties, with the result not of raising any revenue but of absolutely stopping transactions. Here substantial revenue is derived from the taxes. The annual report of the Commissioner of Internal Revenue for the fiscal year ending June 30, 1926, shows that the total revenue under the narcotic law for that fiscal year was $981,739.07, of which $141,369.19 was derived from the one-cent tax now under consideration. The reports of the Commissioner of Internal Revenue show that from July 1, 1918, to June 30, 1926, the one-cent stamp tax now under consideration

yielded $1,200,272.20 and that the total internal revenue tax receipts under the Narcotic Act for this period amounted to $8,663,554.29.

Neither is this a case where the tax is imposed only where there is an infraction of law. Indeed, further argument respecting the validity of the provisions of Section 1 seems out of place.

It is settled that whenever an Act of Congress contains unobjectionable provisions separable from those found to be unconstitutional the Court will sustain the Act in so far as it is valid. (*El Paso & Northeastern Ry. Co.* v. *Gutierrez,* 215 U. S. 87.)

Congress clearly has power to impose the occupation taxes and the stamp tax provided in Section 1. It has power to punish those who deal in drugs without paying the occupation tax and who purchase or sell drugs on which the stamp taxes are unpaid. It has power, in order to prevent dealings in the drugs by those who have not registered and paid the occupation taxes and to prevent violation of the stamp-tax provisions, to exercise the closest supervision over all dealings in the drug and to provide, if it chooses, that no sale or transfer of the drug shall be made except through the use of an order form furnished by the Commissioner of Internal Revenue or a physician's prescription. The order form provisions, as a whole, are not invalid. If Section 2 had provided for the use of order forms in all cases where physicians' prescriptions were not used, but had allowed the order forms to be furnished to and used by any person

whether or not a registered dealer or a physician, no question as to the validity of any part of the statute would exist. It is only because the order-form provision forbids the furnishing of forms to persons not physicians or registered dealers (the effect being to prevent persons not registered dealers or physicians and who want the drug for their own personal use from obtaining the drug) that it is contended that the States' powers have been infringed and that Congress instead of adopting this provision as a reasonable method of enforcing the taxing features of the Act is really invading the States' police powers. If the provision of Section 2, which reads as follows:

> no collector shall sell any such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district—

and the provision in the same Section—

> It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession—

had been omitted from the Act, and the provision of Section 8 that "it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under

his control any of the aforesaid drugs" be construed, as it has, to apply to those required to be registered, no serious question would then exist as to the validity of the Act or any part of it.

The order form provisions of the Act, with the above quoted provisions eliminated, could readily be sustained not only as aids to the tax provisions of this statute but as aids in the enforcement of the Narcotic Drugs Import and Export Act. (Appendix, p. 50.) That statute prohibits the importation of any narcotic drugs or crude opium or cocoa leaves except such amount as a board, consisting of the Secretaries of State, Treasury, and Commerce, determines to be necessary for medicinal and legitimate uses. Opium and cocoa leaves, from which all morphine and cocaine is derived, are not produced in the United States. It is within the power of Congress to require records to be made and order forms to be used in all transactions in narcotic drugs, with the view to determining whether smuggling is going on, and also to determine whether the amount of imports admitted by this board is in excess of that required for medicinal and legitimate uses.

We do not find it necessary to contend that because Congress has restricted imports to the amount required for legitimate uses it may go so far as to prohibit sales for other purposes. See *Keller* v. *United States,* 213 U. S. 138.

What has been said discloses that the provisions of the Harrison Act as amended, the

validity of which is open to any serious discussion, form but a small part of the statute, are readily severable, and in no possible view of the case would their invalidity result in striking down the entire statute or the tax provisions of Section 1.

II

IF THE DECISION IN THE DOREMUS CASE RESPECTING THE VALIDITY OF SECTION 2 OF THE ACT IS TO BE REEXAMINED, THE COURT SHOULD CONSIDER NOT ONLY THE ADEQUACY OF THE REASONS WHICH IT THERE GAVE TO SUPPORT ITS CONCLUSIONS BUT SUCH FURTHER REASONS AS MAY BE ADDUCED IN SUPPORT OF THE VALIDITY OF THE STATUTE

The Court may dispose of this case on the ground that the provisions of Section 1 are valid and are separable from any doubtful provisions in Section 2, but it may approach the case on the assumption that the Act will stand or fall as a whole, thus requiring consideration of the validity of the order form provisions in Section 2.

The preceding analysis of the statute discloses, we think, that the provisions imposing stamp taxes are valid; that those imposing occupation taxes are valid; that the provisions making it unlawful to sell or purchase unstamped drugs or to deal in them without registering and paying an occupation tax are valid; that the provisions forbidding the sale or dispensing of the drug except on medical prescription or through use of order forms—laying aside for a moment the provision restricting the

use of order forms to dealers and physicians—are valid, and that the question is narrowed down to whether the provision of Section 2 forbidding the collector to sell order forms to persons other than registered physicians and dealers, and the provision in that section making it unlawful for a person to obtain the drugs other than for the use, sale, or distribution in a lawful business or in professional practice, together with the complementary provision as to possession, having the effect of prohibiting possession and personal use of the drug by addicts, invade the police power.

The question is even narrower than that. We think it is whether the provisions referred to are invalid in so far as they forbid the purchase and possession of the drug by an individual in quantities not in excess of what he may personally consume. The drugs are poisonous and dangerous. A purchase by an individual who has not registered and paid a tax as a dealer, of a wholesale quantity, or any amount in excess of his possible personal consumption, must necessarily be for the purpose of vending it. Acquiring the drug in such quantities and selling or peddling it make the person a dealer at wholesale or retail, requiring registry and an occupation tax. To prevent an individual who is not a registered dealer from purchasing and possessing more of the drug than is required for his personal use has the direct effect of enforcing the occupation tax as well as the stamp tax provision, and can have no other purpose and effect. It is

only, therefore, the operation of the law which prevents the individual who is not a registered dealer or physician from acquiring, other than by prescription, small quantities of the drug not in excess of what he may personally consume that can be assailed as not related to tax enforcement.

In so far as the Act operates to prevent the individual who is not a registered dealer from obtaining possession of small quantities other than by prescription, it does tend to enforce the occupation and stamp-tax provisions, because such drugs may be peddled or sold and not consumed; but it must be admitted that in doing this it does something more in operating to prohibit one class of persons, who are addicts, from getting the drug for their own consumption other than on physicians' prescriptions, and the question is whether this additional effect of the statute renders it void. In the *Doremus case,* on this point the Court said (249 U. S. 94):

> Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict,

> may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.
>
> We can not agree with the contention that the provisions of Sec. 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes.

An examination of the laws of the States on the subject of narcotics shows that, with the possible exception of South Carolina, whose statute relates to cocaine but says nothing of morphine, every State has statutes prohibiting the purchase and possession of both morphine and cocaine and their derivatives for individual consumption, except on physicians' prescriptions. Of course, the fact that the States may have prohibited acts within their exclusive police power does not empower the United States to do likewise, but the effect of the provision relating to order forms, that they shall not be sold to other than registered dealers and physicians, amounts to little more than a proviso that order forms shall not be furnished to those who, under State law, are prohibited from purchasing the drug, and tends to refute any claim that Congress really intended to invade the power of the States.

If the Court is to reexamine the *Doremus case,* it will be necessary also to examine into the operation and effect of the International Opium Convention. In *United States* v. *Jin Fuey Moy,* 241 U. S. 394, some consideration was given to that subject. The Court said that the provision in Section 2 of the original Harrison Act of 1914 was not required by the Opium Convention and that in any event the question whether the treaty gave to the Congress power to enact the provision in question respecting unlawful possession of the drug was a grave constitutional one. In that opinion the Court said (p. 401):

> If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.

The regulations of the Federal Narcotics Control Board and the International Opium Convention show that morphine is a derivative of opium and cocaine is a derivative of coca leaves. There is no production of either opium or coca leaves within

the United States. This statement has been made repeatedly by the Government of the United States in reports doubtless prepared by the Federal Narcotics Control Board, consisting of the Secretaries of State, of the Treasury, and of Commerce. See Government Report on the Traffic in Opium and Other Dangerous Drugs for the year ending June 30, 1926, Appendix, p. 70. The reference in the statute to production therefore relates to derivatives of the imported opium or coca leaves.

Article 9 of the treaty reads:

> The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale and the use of morphine, cocaine and their respective salts to medical and legitimate uses only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose.

Article 11 is as follows:

> The Contracting Powers shall take measures to prohibit in their internal commerce all transfer of morphine, cocaine and their respective salts to all nonauthorized persons, unless existing measures have already regulated the matter.

In so far as the assailed provisions of Section 2 of the Harrison Act prevent other than registered dealers or physicians, or those obtaining them on medical prescriptions, from purchasing or possessing the drugs, they are plainly in

execution of the agreement contained in Articles 9 and 11 of the treaty. This problem can not be understood without considering, with the Harrison Act, the Narcotic Drugs Import and Export Act, and the treaty provisions.

The United States signed the Convention January 23, 1912, and July 9, 1913, and it signed a final protocol February 11, 1915. This protocol stated that as to Powers signing it after December 31, 1914, the Convention should go into effect when the protocol was signed. The Convention was proclaimed March 3, 1915. (Volume 3 of Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers, 1910 to 1923, Senate Document No. 348, 67th Cong., 4th Sess., p. 3025; Foreign Relations, 1914, p. 939; 1915, pp. 1101, 1311.)

The Narcotic Drugs Import and Export Act was enacted February 9, 1909, and amended on January 17, 1914, and again in 1922. The original Harrison Act, although enacted December 17, 1914, did not take effect by its terms until March 1, 1915, subsequent to February 11, 1915, the date when the Convention took effect and two days prior to its proclamation. It was enacted after the Convention was signed, and in prospect of its becoming operative.

In a telegram sent by the Secretary of State to delegate Henry Van Dyke June 22, 1914, while the Harrison Act was pending in Congress, it was said (Foreign Relations, 1914, p. 931):

> The hesitation of the Conference to put the Convention into effect is seriously em-

barrassing the passage of the fourth and final antinarcotic bill, now in the Senate, which was designed to carry out the terms of the Opium Convention.

The truth of the matter probably is that the original Harrison Act of December 17, 1914, the only tax imposed by it being a tax of $1 per annum on every importer, dealer, or producer, was intended not as a revenue measure but to execute the terms of the Opium Convention, and it was not until the amendments in the Revenue Act of 1918, which imposed substantial taxes on the drug and substantial occupation taxes on the four classes of persons who were authorized to deal in the drugs, that the Act became genuinely a revenue Act. As it stands to-day, it may be considered both, and the power to raise revenue and the treaty power may both be invoked in its support.

It follows that the Court may not strike down those provisions of Section 2 respecting the sale of order forms and the purchase and possession of the drug by individuals for their own use other than on medical prescriptions, without at the same time declaring that the above-quoted provisions of the treaty were void with respect to the United States. Since this subject was discussed in the first *Jin Fuey Moy case*, the Court has decided *Missouri* v. *Holland*, 252 U. S. 416, sustaining the Act enacted in 1918 to enforce the Migratory Bird Treaty. The District Court of the United States in *United States* v. *Shauver*, 214 Fed. 154, and *United States* v. *McCullagh*, 221 Fed. 288, had held

that an earlier Act of Congress regulating the taking of migratory birds was an infringement of the police power of the States. This Court said of the 1918 Act (p. 432):

> If the Treaty is valid there can be no dispute about the validity of the statute under Article I, Sec. 8, as a necessary and proper means to execute the powers of the Government.

The Court further said (p. 433):

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

It is not contended that Congress may invade the police power of the States merely because the United States has made a treaty with a foreign nation agreeing to do so. The question in any such case is whether the treaty deals with an appropriate subject of international agreement and whether the domestic legislation, agreed to be enacted in execution of the treaty, is germane to its subject and is reasonably calculated to aid in solving the international problem to which the treaty relates. The rule with regard to the treaty power seems to be that the National Government may, by treaty, deal

with any matter which is an appropriate subject of international agreement so long as it does not contravene any express prohibition in the Constitution, and that such a treaty and legislation in pursuance of it are the supreme law of the land, though they deal with matters which are ordinarily reserved to the States and to which the ordinary powers of Congress do not extend. That the narcotic problem is an international problem to be solved by international action, and that domestic legislation by each nation, such as was agreed upon in this Convention, is necessary to aid in solving the international problem have been, in effect, declared by the President and the Senate in the negotiation and ratification of the treaty; by Congress in enacting legislation in contemplation of its taking effect; and by high Executive officials who have dealt with and understand the problem. The particular feature of the narcotic problem, which has made international action necessary, is that the drug is handled and used in comparatively small quantities; that traffic across international boundaries is on that account difficult to suppress and regulate; that the prevention of smuggling is exceedingly difficult, and these considerations tend to justify and sustain an international agreement which relates to production, and international agreements that each nation will follow the drug to the consumer. A message from the President to the Senate on February 21, 1910, Appendix, p. 85, inclosed a report from the Secretary of State which confirms the international nature of the problem

and quotes with approval a report of the Shanghai Commission of 1909, which said:

> It has been historically demonstrated that no nation working alone, that no two nations working together, are able to destroy the opium vice. It was a hopeless task. To-day, as the result of the international efforts initiated by this Government, the world is well on its way to see the thorough solution of not only China's oppressive opium problem, but that of other countries not so heavily burdened.

CONCLUSION

It seems to be clear that the stamp tax provisions of the Harrison Act under which Alston was convicted are in themselves valid enactments and separable from those provisions of Section 2 the validity of which has been heretofore questioned; but if the validity of the Act as a whole must be considered, the additional reasons which may be advanced to support the questioned provisions in Section 2 may be accepted as distinguishing this case in principle from those mentioned in the *Daugherty case,* and in justifying the Court in adhering to the conclusion it has heretofore reached.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

APRIL, 1927.

APPENDIX

THE HARRISON ACT AS ORIGINALLY ENACTED DECEMBER 17, 1914

CHAPTER 1

An Act To provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: *Provided,* That the office, or if none, then the residence of any person shall be considered for the purposes of this Act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said

collector a special tax at the rate of $1 per annum: *Provided,* That no employee of any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs, acting within the scope of his employment, shall be required to register or to pay the special tax provided by this section: *Provided further,* That the person who employs him shall have registered and paid the special tax as required by this section: *Provided further,* That officers of the United States Government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the Public Health Service, and for Government hospitals and prisons, and officers of any State government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for State, county, or municipal hospitals or prisons, and officials of any Territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required.

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section.

That the word "person" as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well

as a natural person; and all provisions of existing law relating to special taxes, so far as applicable, including the provisions of section thirty-two hundred and forty of the Revised Statutes of the United States are hereby extended to the special tax herein imposed.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect.

SEC. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof, shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials here-

inbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

(c) To the sale, exportation, shipment, or delivery of any of the aforesaid drugs by any person

within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial district, county, or municipal or insular hospitals or prisons.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred. Every

collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the issuance of the order forms specified in section two shall be performed by the appropriate internal-revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising under this

Act in said islands. The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this Act by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations.

SEC. 3. That any person who shall be registered in any internal-revenue district under the provisions of section one of this Act shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal-revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received.

SEC. 4. That it shall be unlawful for any person who shall not have registered and paid the special tax as required by section one of this Act to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States: *Provided,* That nothing contained in this section shall apply to common carriers engaged in transporting the aforesaid drugs, or to any employee acting within the

scope of his employment, of any person who shall have registered and paid the special tax as required by section one of this Act, or to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, or veterinarian required to register under the terms of this Act, who has been employed to prescribe for the particular patient receiving such drug, or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

SEC. 5. That the duplicate-order forms and the prescriptions required to be preserved under the provisions of section two of this Act, and the statements or returns filed in the office of the collector of the district, under the provisions of section three of this Act, shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs. Each collector of internal revenue is hereby authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in his office to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States, as shall be entitled to inspect the said statements or returns filed in the office of the said collector,

upon the payment of a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested. Any person who shall disclose the information contained in the said statements or returns or in the said duplicate-order forms, except as herein expressly provided, and except for the purpose of enforcing the provisions of this Act, or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs, shall, on conviction, be fined or imprisoned as provided by section nine of this Act. And collectors of internal revenue are hereby authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in their respective collection districts as special-tax payers under the provisions of this Act, upon payment of a fee of $1 for each one hundred names or fraction thereof in the copy so requested.

SEC. 6. That the provisions of this Act shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other prepa-

rations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided,* That such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act. The provisions of this Act shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.

SEC. 7. That all laws relating to the assessment, collection, remission, and refund of internal-revenue taxes, including section thirty-two hundred and twenty-nine of the Revised Statutes of the United States, so far as applicable to and not inconsistent with the provisions of this Act, are hereby extended and made applicable to the special taxes imposed by this Act.

SEC. 8. That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: *Provided,* That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary

surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: *Provided further,* That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.

SEC. 9. That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

SEC. 10. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this Act.

SEC. 11. That the sum of $150,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purpose of carrying into effect the provisions of this Act.

SEC. 12. That nothing contained in this Act shall be construed to impair, alter, amend, or repeal any of the provisions of the Act of Congress approved

June thirtieth, nineteen hundred and six, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," and any amendment thereof, or of the Act approved February ninth, nineteen hundred and nine, entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," and any amendment thereof.

Approved, December 17, 1914.

THE AMENDMENT BY THE REVENUE ACT OF 1918 TO THE HARRISON ACT, WHICH ADDED THE STAMP TAX PROVISIONS.

SEC. 1006. That section 1 of the Act of Congress approved December 17, 1914, is hereby amended to read as follows:

"SECTION 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided;

"Every person who on January 1, 1919, is engaged in any of the activities above enumerataed, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

"Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

"Importers, manufacturers, producers, or compounders, $24 per annum; wholesale dealers, $12 per annum; retail dealers, $6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay $3 per annum.

"Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

"Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

"Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided,* That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided further,* That officials of the United States, Territorial, District of Columbia, or insular possessions, State or mu-

nicipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

"It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

"That the word 'person' as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

"That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue,

with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

"The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided,* That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered

physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept, as required by this Act of the drugs so dispensed, administered, distributed, or given away.

"And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

"That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

"Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect."

SEC. 1007. That section 6 of such Act of December 17, 1914, is hereby amended to read as follows:

"SEC. 6. That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further*, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such per-

son so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

THE NARCOTIC DRUGS IMPORT AND EXPORT ACT.

[The Act of February 9, 1909, as amended by the Act of January 17, 1914, entitled "An Act to amend an Act entitled 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February 9, 1909," as amended by the Act of May 26, 1922]

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

(SEC. 1.) That when used in this Act—

(a) The term "narcotic drug" means opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine;

(b) The term "United States," when used in a geographical sense, includes the several States and Territories and the District of Columbia.

(c) The term "board" means the Federal Narcotics Control Board established by section 2 of this Act; and

(d) The term "person" means individual, partnership, corporation, or association.

SEC. 2. (a) That there is hereby established a board to be known as the Federal Narcotics Con-

trol Board and to be composed of the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce. Except as otherwise provided in this Act or by other law, the administration of this Act is vested in the Department of the Treasury.

(b) That it is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the board shall prescribe. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

(d) Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States

Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 3075 and 3076 of the Revised Statutes, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections.

(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

(g) The master of any vessel or other water craft, or a person in charge of a railroad car or

other vehicle, shall not be liable under subdivision (c), if he satisfies the jury that he had no knowledge of and used due diligence to prevent the presence of the narcotic drug in or on such vessel, water craft, railroad car, or other vehicle; but the narcotic drug shall be seized, forfeited, and disposed of as provided in subdivision (d).

SEC. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.

SEC. 4. That any person subject to the jurisdiction of the United States who shall, either as principal or as accessory, receive or have in his possession, or conceal on board of or transport on any foreign or domestic vessel or other water craft or railroad car or other vehicle destined to or bound from the United States or any possession thereof, any smoking opium or opium prepared for smoking, or who, having knowledge of the presence in or on any such vessel, water craft, or vehicle of such article shall not report the same to the principal officer thereof, shall be subject to the penalty provided in section 2 of this Act. Whenever on trial for violation of this section the defendant is shown to have or to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury: *Provided, however,* That any master of a vessel or other water craft, or

person in charge of a railroad car or other vehicle, shall not be liable under this section if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of such article in or on such vessel, water craft, car, or other vessel, and any such article shall be forfeited and shall be destroyed.

SEC. 5. That no smoking opium or opium prepared for smoking shall be admitted into the United States or into any territory under its control or jurisdiction for transportation to another country, or be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or for any other purpose; and, except with the approval of the board, no other narcotic drug may be so admitted, transferred, or transshipped.

SEC. 6. (a) That it shall be unlawful for any person subject to the jurisdiction of the United States Government to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any narcotic drug to any other country: *Provided,* That narcotic drugs (except smoking opium and opium prepared for smoking, the exportation of which is hereby absolutely prohibited) may be exported to a country only which has ratified and become a party to the convention and final protocol between the United States Government and other powers for the suppression of the abuses of opium and other drugs, commonly known as the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that con-

vention, a system, which the board deems adequate, of permits or licenses for the control of imports of such narcotic drugs; (2) the narcotic drug is consigned to an authorized permittee; and (3) there is furnished to the board proof deemed adequate by it that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported, that it will not be reexported from such country, and that there is an actual shortage of and a demand for the narcotic drug for medical and legitimate uses within such country.

(b) The Secretary of State shall request all foreign Governments to communicate through the diplomatic channels copies of the laws and regulations promulgated in their respective countries which prohibit or regulate the importation and shipment in transit of any narcotic drug and, when received, advise the board thereof.

(c) The board shall make and publish all proper regulations to carry into effect the authority vested in it by this Act.

SEC. 7. That any person who exports or causes to be exported any of the aforesaid drugs in violation of the preceding section shall be fined in any sum not exceeding $5,000 nor less than $50, or by imprisonment for any time not exceeding two years, or both. And one-half of any fine recovered from any person or persons convicted of an offense under any section of this Act may be paid to the person or persons giving information leading to such recovery, and one-half of any bail forfeited and collected in any proceedings brought under this Act may be paid to the person or persons giving the

information which led to the institution of such proceedings if so directed by the court exercising jurisdiction in the case: *Provided,* That no payment for giving information shall be made to any officer or employee of the United States.

SEC. 8. (a) That a narcotic drug that is found upon a vessel arriving at a port of the United States or territory under its control or jurisdiction and is not shown upon the vessel's manifest, or that is landed from any such vessel without a permit first obtained from the collector of customs for that purpose, shall be seized, forfeited, and disposed of in the manner provided in subdivision (d) of section 2, and the master of the vessel shall be liable (1) if the narcotic drug is smoking opium, to a penalty of $25 an ounce, and (2) if any other narcotic drug, to a penalty equal to the value of the narcotic drug.

(b) Such penalty shall constitute a lien upon the vessel which may be enforced by proceedings by libel in rem. Clearance of the vessel from a port of the United States may be withheld until the penalty is paid, or until there is deposited with the collector of customs at the port, a bond in a penal sum double the amount of the penalty, with sureties approved by the collector, and conditioned on the payment of the penalty (or so much thereof as is not remitted by the Secretary of the Treasury) and of all costs and other expenses to the Government in proceedings for the recovery of the penalty, in case the master's application for remission of the penalty is denied in whole or in part by the Secretary of the Treasury.

(c) The provisions of law for the mitigation and remission of penalties and forfeitures incurred for violations of the customs laws shall apply to penalties incurred for a violation of the provisions of this section.

SEC. 9. That this Act may be cited as the "Narcotic Drugs Import and Export Act."

INTERNATIONAL OPIUM CONVENTION

His Majesty the German Emperor, King of Prussia in the name of the German Empire; The President of the United States of America; His Majesty the Emperor of China; The President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Imperial Majesty the Shah of Persia; the President of the Portuguese Republic; His Majesty the Emperor of All the Russias; His Majesty the King of Siam

being desirous to take one step further in the way marked out by the International Commission at Shanghai in 1909;

resolved to pursue progressive suppression of the abuse of opium, morphine, cocaïne as well as drugs prepared or derived from these substances giving rise or which may give rise to analogous abuses;

taking into consideration the necessity and the mutual profit of an international understanding on this point;

being convinced that they will meet in this humanitarian effort the unanimous adhesion of all the nations interested,

have resolved to conclude a Convention for this purpose and have appointed as their Plenipotentiaries, to wit:

[Here follows a list of the names.]

Chapter I

Raw opium

Definition.—By raw opium shall be understood: The spontaneously coagulated sap obtained from capsules of the soporific poppy (Papaver somniferum), and which shall not have been subjected to any but the processes necessary to the packing and the transportation thereof.

Article 1

The Contracting Powers shall enact efficacious laws or regulations for the control of the production and distribution of raw opium, unless existing laws or regulations have already regulated the matter.

Article 2

The Contracting Powers, taking into account the differences in their trade conditions, shall limit the number of towns, ports or other places through which the importation or exportation of raw opium shall be permitted.

Article 3

The Contracting Powers shall take measures:

a. to prevent the exportation of raw opium to countries which shall have prohibited the entry thereof, and

b. to control the exportation of raw opium to countries which shall have limited the importation thereof,

Unless existing measures have already regulated the matter.

Article 4

The Contracting Powers shall issue regulations to provide that every package containing raw opium destined for exportation shall be marked in such a manner as to indicate its contents, providing the consignment shall exceed 5 kilograms.

Article 5

The Contracting Powers shall not permit the importation and exportation of raw opium except through duly authorized persons.

CHAPTER II

Prepared opium

Definition.—By prepared opium shall be understood:

The product of raw opium obtained by a series of special processes, particularly by dissolution, boiling, heating and fermentation, and which is meant to be made into the form of an extract suitable for consumption.

Prepared opium comprises dross and all other residues of smoked opium.

Article 6

The Contracting Powers shall take measures for the gradual and efficacious suppression of the

manufacture, the internal traffic in and the use of prepared opium in so far as the different conditions peculiar to each nation shall allow of this, unless existing measures have already regulated the matter.

Article 7

The Contracting Powers shall prohibit the importation and exportation of prepared opium; however, those nations which are not yet ready to prohibit the exportation of prepared opium at once, shall prohibit such exportation as soon as possible.

Article 8

The Contracting Powers which are not yet prepared to prohibit at once the exportation of prepared opium:

a. shall limit the number of towns, ports or other places through which it shall be possible for prepared opium to be exported;

b. shall prohibit the exportation of prepared opium to the countries which now prohibit, or which shall later prohibit the importation thereof;

c. shall prohibit, in the meanwhile, that any prepared opium be sent to a country which desires to limit the entry thereof, unless the exporter shall conform to the regulations of the importing country;

d. shall take measures to the effect that each package exported containing prepared opium shall bear a special mark indicating the nature of its contents;

e. shall not permit the exportation of prepared opium except through the agency of persons especially authorized.

Chapter III

Medicinal opium, morphine, cocaine, etc.

Definitions. By medicinal opium shall be understood:

raw opium which shall have been heated to 60 degrees centigrade whether or not powdered or granulated, or whether or not mixed with neutral substances, and which shall not contain less than 10% of morphine.

By morphine shall be understood:

the principal alkaloid of opium, expressed by the chemical formula $C_{17}H_{19}NO_3$.

By cocaine shall be understood:

the principal alkaloid of the leaves of Erythroxylon Coca, expressed by the formula $C_{17}H_{21}NO_4$.

By heroin shall be understood:

morphine-diacetylate, expressed by the formula $C_{21}H_{23}NO_5$.

Article 9

The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale and the use of morphine, cocaine and their respective salts to medical and legitimate uses only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose.

Article 10

The Contracting Powers shall use their best efforts to control, or to cause to be controlled all those who manufacture, import, sell, distribute and export morphine, cocaine and their respective salts,

as well as the buildings where such persons exercise that industry or that commerce.

To this end, the Contracting Powers shall use their best efforts to adopt or to cause to be adopted the following measures, unless existing measures have already regulated the matter:

a. to limit the manufacture of morphine, cocaine and their respective salts to the premises and localities alone which shall have been authorized to this effect or to keep themselves informed as to the establishments and places where such drugs are manufactured, and to keep a register thereof;

b. to demand that all those who manufacture, import, sell, distribute, and export morphine, cocaine, and their respective salts shall be provided with an authorization of a license to carry on these operations, or shall make an official declaration thereof to the competent authorities.

c. to demand of these persons the register on their books the quantities manufactured, the importations, the sales or any other transfer and exportations of morphine, cocaine and their respective salts. This rule shall not apply necessarily to medical prescriptions and to sales made by duly authorized pharmacists.

Article 11

The Contracting Powers shall take measures to prohibit in their internal commerce all transfer of morphine, cocaine and their respective salts to all nonauthorized persons, unless existing measures have already regulated the matter.

Article 12

The Contracting Powers, taking the differences in their conditions into account, shall use their

best efforts to limit the importation of morphine, cocaine and their respective salts, to authorized persons.

Article 13

The Contracting Powers shall use their best efforts to adopt, or cause to be adopted, measures to the end that the exportation of cocaine, morphine and their respective salts from their countries, possessions, colonies and leased territories to the countries, possessions, colonies and leased territories of the other contracting powers, except in case the persons for whom the drugs are intended shall have received authorizations or permits granted in conformity with the laws or regulations of the importing country.

To this end every government may from time to time communicate to the governments of the exporting countries lists of the persons to whom authorizations or permits to import morphine, cocaine and their respective salts shall have been granted.

Article 14

The Contracting Powers shall apply the laws and regulations for the manufacture, importation, sale or exportation of morphine, cocaine and their respective salts:

a. to medicinal opium;

b. to all preparations (officinal and non-officinal including the so-called anti-opium remedies) containing more than 0.2% of morphine or more than 0.1% of cocaine;

c. to heroin, its salts and preparations containing more than 0.1% of heroin.

d. to every new derivative of morphine, cocaine or their respective salts or to any other alkaloid of opium which might after generally recognized scientific investigations give rise to similar abuse and to result in the same injurious effects.

Chapter IV

Article 15

The Contracting Powers having treaties with China (Treaty Powers) shall take, in concert with the Chinese Government, the measures necessary for the prevention of the smuggling, as well with respect to Chinese territory as with respect to their colonies in the Far East and the leased territories which they occupy in China, of raw and prepared opium, morphine, cocaine and their respective salts, as well as of the substances indicated in article 14 of the present Convention. On its side the Chinese Government shall take analogous measures for the suppression of the smuggling of opium and the other substances hereinbefore indicated, from China to foreign colonies and leased territories.

Article 16

The Chinese Government shall promulgate pharmacy laws for its subjects, regulating the sale and distribution of morphine, cocaine and their respective salts and of the substances indicated in article 14 of the present Convention, and shall communicate these laws to the Governments having treaties with China, through the intermediary of their diplomatic representatives at Pekin. The Contracting Powers having treaties with

China shall examine these laws, and, if they find them acceptable, shall take the necessary measures to the end that they be applied to their nationals residing in China.

Article 17

The Contracting Powers having treaties with China shall undertake to adopt the measures necessary for the restraint and control of the opium-smoking habit in their leased territories, "settlements" and concessions in China, for the suppression *pari passu* with the Chinese Government of the opium divans or similar establishments which may still exist there, and for the prohibition of the use of opium in houses of amusement and of prostitution.

Article 18

The Contracting Powers having treaties with China shall take effective measures for the gradual reduction, *pari passu* with the effective measures which the Chinese Government shall take to the same end, of the number of shops, intended for the sale of raw and prepared opium, which may still exist in their leased territories, settlements and concessions in China. They shall adopt efficacious measures for the restraint and control of the retail trade in opium in the leased territories, settlements and concessions, unless existing measures have already regulated the matter.

Article 19

The Contracting Powers who have post-offices in China shall adopt efficacious measures to prohibit

the illegal importation into China, in the guise of a postal package, as well as the illegal transmission from one locality to another in China through the intermediary of these post-offices, of opium, whether raw or prepared, of morphine and of cocaine and their respective salts, and of other substances indicated in article 14 of the present Convention.

Chapter V

Article 20

The Contracting Powers shall examine into the possibility of enacting laws or regulations making the illegal possession of raw opium, prepared opium, morphine, cocaine and their respective salts liable to penalties, unless existing laws or regulations have already regulated the matter.

Article 21

The Contracting Powers shall communicate to each other, through the Netherlands Ministry for Foreign Affairs:

a. the text of the laws and the administrative regulations in existence which concerns matters aimed at by the present convention or enacted by virtue of its clauses;

b. statistical information with respect to that which concerns the traffic in raw opium, prepared opium, morphine, cocaine and their respective salts, as well as all other drugs or their salts or preparations aimed at by the present Convention.

These data shall be furnished with as much detail and in as short a time as shall be deemed possible.

Chapter VI

Final Provisions

Article 22

The Powers not represented at the Conference shall be permitted to sign the present Convention.

To this end, the Netherlands Government shall invite, immediately after the Convention shall have been signed by the Plenipotentiaries of the Powers who have taken part in the Conference, all the Powers of Europe and of America not represented at the Conference, to wit, the Argentine Republic; Austria Hungary; Belgium; Bolivia; Brazil; Bulgaria; Chile; Colombia; Costa Rica; Republic of Cuba; Denmark; Dominican Republic; Republic of Ecuador; Spain; Greece; Guatemala; Republic of Haiti; Honduras; Luxemburg; Mexico; Montenegro; Nicaragua; Norway; Panama; Paraguay; Peru; Roumania; Salvador; Servia; Sweden; Switzerland; Turkey; Uruguay; United States of Venezuela, to designate a Delegate armed with the full powers necessary for the signing of the Convention at The Hague.

The Convention shall be furnished with these signatures by means of a "Protocol of signature of Powers not represented at the Conference," to be added after the signatures of the Powers represented and indicating the date of each signature. The Netherlands Government shall give notice every month, to all the Signatory Powers, of each supplementary signature.

Article 23

After all the Powers, as much for themselves as for their possessions, colonies, protectorates and

leased territories, shall have signed the Convention, or the supplementary Protocol hereinbefore indicated, the Netherlands Government shall invite the Powers to ratify the Convention together with this Protocol.

In case the signature of all the Powers invited shall not have been secured by December 31, 1912, the Netherlands Government shall immediately invite all the Powers who have signed by that date, to designate Delegates to proceed to the Hague to examine into the possibility of nevertheless depositing their ratifications.

Ratification shall be executed within as short a time as possible and shall be deposited at once at The Hague in the Ministry for Foreign Affairs.

The Netherlands Government shall give notice every month to the Signatory Powers of the ratifications which it shall have received in the interval.

As soon as the ratifications of all the signatory Powers, as much for themselves as for their colonies, possessions, protectorates and leased territories, shall have been received by the Netherlands Government, this government shall give notice to all the Powers who shall have ratified the Convention, of the date on which the last of such acts of ratification shall have been received.

Article 24

The present Convention shall go into effect three months after the date mentioned in the Netherlands Government's notification, as indicated in the last paragraph of the preceding article.

With regard to the laws, regulations and other measures provided for by the present Convention,

it is agreed that the drafts necessary to this end shall be drawn up not later than six months after the going into effect of the Convention. With regard to the laws, these shall also be proposed by the Governments to their parliaments or legislative bodies within this same period of six months, and in any case at the first session which shall follow the expiration of this period.

The date from which these laws, regulations, or measures shall go into effect shall be the subject of an agreement between the signatory Powers, at the instance of the Netherlands Government.

In case questions shall arise relative to the ratification of the present Convention, or relative to the going into effect of the Convention, or of the laws, regulations and measures which such Convention involves, the Netherlands Government, if these questions cannot be decided by other means, shall invite all the Signatory Powers to designate delegates who shall assemble at The Hague to come to an immediate agreement on these questions.

Article 25

If it should happen that one of the Contracting Powers should wish to denounce the present Convention, such denunciation shall be notified in writing to the Netherlands Government, who shall immediately communicate a certified copy in conformity with such notification to all the other Powers, informing them at the same time as to the date on which it received such notification.

The denunciation shall have no effect except with respect to the Power who shall have given notice thereof and one year after such notice shall have reached the Netherlands Government.

In witness whereof, the Plenipotentiaries have affixed their signatures to the present Convention.

Done at The Hague, January 23, 1912, in one single copy, which shall remain deposited in the archives of the Government of the Netherlands and copies of which, certified in conformity, shall be delivered through diplomatic channels to all the Powers represented at the Conference.

[Here follow signatures.]

PORTIONS OF A REPORT BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS FOR THE YEAR ENDED JUNE 30, 1926

A. General

No new Federal laws were enacted during the fiscal year ended June 30, 1926, affecting the traffic in opium and other dangerous drugs except as noted in (3) "Internal regulation of the manufacture, sale, distribution, use, etc., of narcotic drugs." A few amendments to existing regulations were issued to improve certain details of the established system. There were no changes in the administrative arrangements.

REGULATION OF IMPORTS AND EXPORTS

(*a*) *Exportations.*—Exportations of narcotic drugs are by law restricted to shipments only to a country which has ratified and become a party to the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that convention, a system which the Federal Narcotics Control Board (consisting of the Secretaries of State, the Treasury, and Commerce) deems adequate of per-

mits or licenses for the control of imports of such narcotic drugs; (2) the narcotic drug is consigned to an authorized permittee; and (3) there is furnished to the Federal Narcotics Control Board proof deemed adequate by it that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported, that it will not be reexported from such country, and that there is an actual shortage of and a demand for the narcotic drug for medical and legitimate uses within such country. An individual permit for each shipment is issued by the Federal Narcotics Control Board upon proper application accompanied by an import certificate issued by a duly authorized official of the country of destination covering information required under (2) and (3), as stated in the preceding sentence, fulfillment of (1) being prerequisite to the issuance of such an import certificate. American exporters continue to experience difficulty in securing import certificates from many governments which will meet the requirements of the American export law, but an improvement is noted over the year 1925.

No exportation is permitted by post. No permit is issued for the exportation of crude opium or coca leaves as such. All exporters must be properly qualified under the internal revenue law and all narcotic products exported are duly sealed with internal-revenue stamps.

(*b*) *Importations.*—Importations are by law restricted to crude opium and coca leaves, and are limited to such quantities thereof as are considered necessary by the Federal Narcotics Control Board

for legitimate and medical uses only. Individual import licenses for specified quantities within such limits are issued by this board to manufacturers, properly qualified under the internal revenue law, having apparatus or equipment in use in the manufacture of derivatives of opium and coca leaves. To expedite shipment, advice of the issuance of an import permit is sent by cable to the American consul at the port of exportation upon request of the importer, and the consul will not certify the invoice until duly informed of the issuance of such a permit. All narcotic drugs arriving in the United States without due authorization are subject to seizure and confiscation. No difficulty has arisen in carrying out the requirements with respect to import licenses or permits.

(*c*) *In-transit shipments.*—In-transit shipments of smoking opium or opium prepared for smoking are forbidden by law. Other narcotic drugs may be shipped through the United States or a port thereof only upon permission of the Federal Narcotics Control Board. The general policy of this board with respect to the issuance of permits authorizing in-transit shipments is the same as that for exports; i. e., a permit for an in-transit shipment will be issued only if a permit for exportation could properly have been issued. This policy is based on the theory that this board should not permit the in-transit facilities of the United States to be used for transactions forbidden by its laws if occurring within the jurisdiction of such laws, such theory being especially supported by the fact that the same law is the authority for both the export and the in-transit permits.

* * * * *

Only a very small part of the drugs manufactured in the United States was diverted during the year 1926 to illicit channels, even less than in 1925. The established accounting, record, and inspection systems afforded adequate safeguards. Difficulty was encountered in the attempt to eliminate the traffic in smuggled drugs.

There are still large quantities of narcotic drugs, such as morphine (chiefly morphine hydrochloride, of which comparatively little is manufactured in the United States), heroin (not manufactured in the United States), and cocaine, being unlawfully brought or smuggled into this country, particularly on the east coast, for the reason that smuggled narcotics now constitute the chief source of supply of the nonmedical addicts. Due to extensive shipping, the ease with which these drugs may be concealed, and the employment of more methodical means of smuggling, customs officers experienced difficulty in making seizures. Information acquired by enforcement officers indicated well-organized and prearranged schemes for smuggling involving illicit dealers in this country and illicit sellers in foreign countries.

* * * * *

B. Particular Drugs

RAW OPIUM

(*a*) Opium is not produced in the United States. All supplies thereof are imported.

(*b*) Opium may be imported only through the ports of—

Detroit, Michigan.
Indianapolis, Indiana.

New York, New York.
Philadelphia, Pennsylvania.
St. Louis, Missouri.
San Francisco, California.

During the year ended June 30, 1926, the following importations were made:

Importations of opium from July 1, 1925, to June 30, 1926

Country from which exported to the United States:	Pounds (avoirdupois)
Greece	44,959.5
Turkey in Europe	47,243.75
England	12,210
Persia	800
Turkey in Asia	2,534.25
Total	107,747.5

(*c*) No distinction is made among the different kinds of opium imported in so far as manufacturing purposes are concerned. During the year ended June 30, 1926, a total of 116,835.25 pounds (avoirdupois) was used in manufacturing. This embraces the production of all products of opium required of the manufacturers through legitimate trade demands. No separate record is required showing the quantities of opium used for the production of stated drugs. During the year 15,351.75 pounds (avoirdupois) of medicinal (deodorized, granulated, and powdered) opium were manufactured. Statements with respect to the manufacture of other particular drugs are hereinafter included under the proper headings.

(*d*) *Other uses.*—Opium and products thereof are used for medicinal and scientific purposes only. There are no other lawful uses in the United States.

(*e*) *Exports.*—Exportations of narcotic drugs may, when duly licensed, be made through any port

of the United States. No crude opium is permitted to be exported from the United States; all exports coming under the heading of "Opium" consist of medicines containing opium and opium in deodorized, granulated, or powdered form.

* * * * *

PREPARED OPIUM

(*a*) There is little opium smoking in the United States among the (1) national or (2) alien population. Only 84 cases of violation of the smoking opium law were reported during the year; 62 persons were convicted of violation and 3 were acquitted.

Opium used for smoking purposes is smuggled chiefly along the Pacific coast and through the ports of Seattle and San Francisco. While a large part is apprehended and seized on arrival, it is believed that the traffic could be more effectively combated by employing additional means at the ports of exit to prevent placing opium aboard ships sailing for the United States.

MORPHINE

(*a*) *Imports.*—Morphine and all salts, derivatives, preparations, admixtures, etc., thereof are forbidden by law to be imported or brought into the United States.

(*b*) *Manufacture.*—Morphine is manufactured by the following companies at the locations stated:

Mallinckrodt Chemical Works, St. Louis, Missouri.
Merck & Co., Rahway, New Jersey.
New York Quinine & Chemical Works, Borough of Brooklyn, New York, New York.

Powers-Weightman-Rosengarten Co., Philadelphia, Pa.

In recording and reporting manufacturing operations the quantity of opium used in manufacturing is stated, but the drug proposed to be produced is not indicated at the time, although completely reported when production is finished. (See part "C. Miscellaneous (14). Additional information and suggestions.") Since a total of 116,835.25 pounds (avoirdupois) of opium was used in manufacturing during the year and 15,351 pounds (avoirdupois) of deodorized, granulated, and powdered opium were produced, it follows that approximately 101,483.5 pounds (avoirdupois) were used in producing morphine, codeine, and dionin, and products thereof. The latter figure must be considered approximate only, as stated, because the quantity of crude gum opium required to produce 15,351.75 pounds of deodorized, granulated, and powdered opium, United States Pharmacopœia standard, will vary to agree with the variance between the percentage of anhydrous morphine contained in the gum opium used and the percentage required for these United States Pharmacopœia products. The United States Pharmacopœia standard for deodorized, granulated, and powdered opium is not less than 10 per cent nor more than 10.5 per cent of anhydrous morphine, and for opium not less than 9.5 per cent. The opium imported seldom contains less than this standard and frequently yields 3 to 4 per cent more. Considerable variance in the imported material is noted. Since for accounting purposes it has been found preferable not to distinguish among differ-

cut forms of drug production in factories or to require different records and reports for packaging or repackaging operations, better information is to be obtained from the statistics for sales of opium products as reported by manufacturers thereof. Likewise, since little codeine is produced except from morphine, the sales of codeine, heroin, and dionin will indicate the morphine used in the manufacture of these drugs. Products sold were manufactured either from opium used during the year or taken from stock previously produced for sale.

Sales of opium and opium derivatives by manufacturers (bonded), year ended June 30, 1918

Opium (powdered, granulated, and powdered, accidental sale of gum)	pounds (avoirdupois)	10,920.25
Morphine	ounces	1,509,675
Codeine	do	156,980
Heroin	do	[1] 0
Dionin	do	[1] 5,000
Other opium products	do	[1] 4,700

Practically all of the foregoing sales were made to manufacturers of pharmaceutical preparations and to wholesale dealers selling to retail druggists, physicians, hospitals, etc.; few sales of morphine, codeine, etc., are made directly by the manufacturers thereof to customers of wholesale dealers. This is commercial practice, not the result of any requirement of law. The quantities of opium and its derivatives involved in products purchased from manufacturers of pharmaceutical preparations combined with the quantities of pure opium, morphine, codeine, etc., purchased from the manufacturers thereof, or, in other words, the total quanti-

[1] Manufactured prior to 1918.

tive of opium and opium derivatives in whatever medicinal form purchased from all manufacturers as a unit, will indicate the more immediate requirement of the population.

* * * * *

(c) *Exports.*—Very little pure morphine is exported from the United States. Practically all morphine exported is contained in pills, tablets, preparations, mixtures, and other pharmaceutical forms. Separate statistics are available for (1) morphine and pharmaceutical products containing morphine, (2) the same for heroin, and (3) the same for dionin (ethyl morphine hydrochloride).

* * * * *

(d) *Legitimate home consumption.*—The Government desires to call special attention to official figures which indicate the consumption for legitimate purposes within the United States of morphine and opium. These figures do not support the widely published estimate of domestic per capita consumption made by a Government committee in 1918, at which time there was no means of obtaining accurate statistics of the nature herein reported. During the year 1926 the quantity of morphine sold by manufacturers thereof, less the quantity exported, totaled 202,845 ounces, which is probably a fair indication of the home consumption of this drug in whatever form required for legitimate purposes. In this connection it may be noted that the figure for legitimate morphine consumption during 1925, ascertained in the same manner, was 205,235 ounces. The officially estimated total population of the continental United States on June 30, 1926, was 117,136,000. The total net sale of 202,845 avoirdupois ounces of morphine is equiv-

about to 44,994,687.5 grains, which, divided by the population as officially estimated, would indicate an average per capita consumption for 1926 of 0.384 grain. Similarly, during 1926, a net quantity of 10,736.5 pounds of opium in medicinal form was sold for domestic use, or an equivalent of 75,155,500 grains. This figure, divided by the figure for the officially estimated population, gives 0.64 grain as the per capita consumption of opium for 1926. Since opium is equivalent in morphine to only about 10 per cent of its weight, it follows that the per capita consumption of opium in terms of morphine is equivalent to 0.064 grain. The two figures added together give a total per capita consumption for 1926 covering opium and morphine combined of 0.448 grain or, with slight approximation, 0.45 grain. It appears unnecessary to consider other products of opium in this connection, such as codeine, dionin, narcotine, as their habit-forming effect is slight as compared with opium and morphine. Moreover, since the legitimate drug market in the United States is practically devoid of heroin, it is unnecessary further to consider that drug in determining the domestic consumption for legitimate purposes. The Government, therefore, urges all concerned to take notice of the foregoing figure and fully observe that the annual legitimate consumption in the United States of the admittedly dangerous and vicious habit-forming drugs producible from the poppy plant is less than the equivalent of one-half grain of morphine per person.

* * * * *

(*c*) The use or possession of morphine and preparations thereof for proper purposes is au-

thorized through a system of registration of all persons or firms dealing therein commercially or professionally. The system is the same for all opium products and for coca leaves, cocaine, and preparations thereof. The internal revenue law (act of December 17, 1914, as amended) providing for the assessment and collection of annual taxes from persons so handling narcotic drugs classifies those required to register and pay tax and defines the classes as follows:

(1) Importers, manufacturers, producers, and compounders.

(2) Wholesale dealers—persons or firms selling or offering for sale narcotic drugs and preparations in the original stamped packages, exclusive of importers, manufacturers, producers, and compounders selling or offering for sale packages of their own stamping.

(3) Retail dealers—persons or firms selling or dispensing narcotic drugs and preparations from original stamped packages; i. e., druggists filling prescriptions for narcotic drugs and preparations.

(4) Physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer narcotic drugs and preparations to patients upon whom they in the course of their professional practice are in attendance.

(5) Manufacturers, producers, compounders, and vendors of preparations and remedies not subject to tax because of low narcotic content, etc.

The importer, manufacturer, producer, or compounder attaches stamps to each package upon removal from customs custody or from his premises, as the case may be. The possession of taxable

narcotic drugs or preparations by persons not required to register, unless such drugs or preparations have been obtained from a registered dealer in pursuance of a prescription issued for legitimate medical uses by a registered practitioner, the labels on the containers so to indicate, or, unless obtained directly from the attending registered practitioner for legitimate medical purposes, is prima facie evidence of liability under the law the use by the patient is controlled by the attending practitioner, who is responsible for the use of all narcotic drugs or preparations dispensed in the case either directly or by prescription.

HEROIN

(*a*) No heroin is permitted to be imported or brought into the United States.

(*b*) Manufacturers of heroin sold 8 ounces thereof during the year ended June 30, 1926, a decrease of 5,427 ounces. (See "(14), Additional information and suggestions," under "C. Miscellaneous," for particulars concerning manufacturing processes, and part entitled "(*c*), Effect of discontinuance of manufacture of heroin.") An act was approved June 7, 1924, prohibiting the importation of opium for the purpose of manufacturing heroin. The Federal Narcotics Control Board ruled that heroin manufactured prior to June 7, 1924, was not affected by the new law, but that manufacturers must immediately cease the production of heroin from opium or morphine or other opium derivatives, even though such opium or its derivatives was imported or manufactured prior to the passage of the new act. No opium or mor-

phine was accordingly used during 1926 for manufacturing heroin; sales reported were from stocks previously produced. It will be noted that the year 1926 marks the end of sales of heroin by manufacturers thereof.

(*c*) *Exports.*—Practically all heroin exported is part content of medicinal preparations.

* * * * *

(*d*) Sales of heroin by its manufacturers for the four years 1921 to 1924, inclusive, averaged 17,400 ounces. This figure indicates the approximate annual consumption of heroin for medicinal purposes during those years was 17,000 ounces, the exports being about 400 ounces annually with the exception of 1922, when there was an aggregate exportation of 1,123 ounces. Due to the act of June 7, 1924, prohibiting the importation of opium for the purpose of manufacturing heroin, the sales of heroin for 1926 by manufacturers thereof dropped to 8 ounces. Little heroin is used for scientific purposes.

(*e*) Classes of persons to whom authority is granted for the use or possession of heroin are the same as for morphine.

MEDICINAL OPIUM

All information with respect to medicinal opium has been given under "(4) Raw opium" except the net quantity sold by manufacturers, which amounted to 10,920.25 pounds (avoirdupois). Little medicinal opium is used for scientific purposes, and all quantities consumed as medicine are in combination with other (nonnarcotic) drugs. The use and possession of medicinal opium are regulated the same as the use and possession of morphine and preparations thereof.

COCAINE

(*a*) The coca plant is not grown in the United States. Crude cocaine is not produced by manufacturers, practically all cocaine manufactured being in hydrochloride form. Very little pure cocaine is exported.

* * * * *

(*b*) Neither (1) crude cocaine, (2) refined cocaine or its salts, or (3) any preparation containing cocaine is permitted to be imported into the United States. During the year 133,053.5 pounds (avoirdupois) of crude coca leaves were imported from Peru and 129,617 pounds from Holland; total importation, 262,670.5 pounds.

(*c*) Cocaine is extracted from the leaves only in the factories of—

The Maywood Chemical Works, Maywood, New Jersey.
Merck & Co., Rahway, New Jersey.

* * * * *

(*d*) Authority for the possession and use of coca leaves, cocaine and preparations thereof is granted under the same system which is by law provided for morphine. (See "(6), Morphine," paragraph (*e*).)

OTHER DRUGS TO WHICH THE CONVENTION IS HELD TO APPLY

The Government has no report to make with respect to any other particular drug.

* * * * *

ADDITIONAL INFORMATION AND SUGGESTIONS

(*a*) *Manufacture.*—Statements made in previous reports with respect to the drug manufacturing

business in the United States are repeated below, with statistical changes resulting during the year 1926.

There are four factories in which opium is used for the production of medicinal opium, alkaloids of opium, and direct and indirect products or derivatives of opium, i. e., powdered opium, granulated opium, morphine alkaloid, morphine sulphate, codeine alkaloid, codein phosphate, ethyl morphine hydrochloride, narcotine, etc. There are two factories in which cocaine is produced from coca leaves, one of which is one of the four concerns manufacturing opium products. There are 317 other persons or firms registered under the internal revenue law as manufacturers, producers, or compounders of taxable narcotic drugs and preparations. Some of these manufacture only one or two special medicinal preparations. Many are primarily retail druggists who manufacture for their own trade tincture of opium, Dover's powder, and other standard narcotic preparations easily compounded. The remainder constitutes the manufacturers of pharmaceutical preparations of all kinds required by pharmacies, physicians, surgeons, dentists, and hospitals. The five manufacturers of coca-leaf and opium products do not engage in the manufacture of pharmaceutical preparations. Likewise, the 317 manufacturers of pharmaceutical products do not attempt the extraction of opium alkaloids and derivatives of cocaine. This arrangement has not been required by law and is entirely a commercial development.

* * * * *

(*b*) *Imports.*—The Federal Narcotics Control Board is by law required to limit importations of

crude opium and coca leaves (the only narcotic drugs which may be lawfully imported) to the quantities actually required for medical and legitimate uses only. Since the files, records, and reports required of persons authorized to purchase narcotic drugs and pharmaceutical preparations for distribution effectively restrict their use to authorized medicinal purposes, the sales made by manufacturers to persons so authorized may properly be considered to embrace only the quantities actually needed for medicinal purposes. Because of restriction there can be no object in making excessive purchases from manufacturers, for there can be no administering or dispensing in a given case without a proven medicinal need, which need is confirmed, claimed, and authorized by the action of the attending physician, surgeon, or dentist. Manufacturers' reports, therefore, reveal the legitimate requirements. On these reports this board largely bases its limits with respect to importations of opium and coca leaves, other factors such as margins of stock necessary to proper operation of factories, margins for possible epidemics, and other legitimate requirements being given due consideration.

[Senate Document No. 377, Sixty-first Congress, second session]

OPIUM PROBLEM

Message from the President of the United States, transmitting from the Secretary of State a report on the International Opium Commission and on the opium problem as seen within the United States and its possessions, prepared by Mr. Hamilton Wright on behalf of the American delegates to the said commission, held at Shanghai in February, 1909

February 21, 1910.—Read; referred to the Committee on Foreign Relations and ordered to be printed

To the Senate and the House of Representatives:

I transmit herewith a communication from the Secretary of State transmitting a report on the International Opium Commission and on the opium problem as seen within the United States and its possessions, prepared by Mr. Hamilton Wright on behalf of the American delegates to the said commission, held at Shanghai in February, 1909. In reference to this report the Secretary of State makes certain recommendations regarding an appropriation and other legislative action, which I commend to the Congress with my approval and the request that action should be taken accordingly.

WM. H. TAFT.

THE WHITE HOUSE, *February 21, 1910.*

The PRESIDENT:

I have the honor to transmit herewith a report by Mr. Hamilton Wright on behalf of the Ameri-

can delegates to the International Opium Commission of 1909, submitting the proceedings and resolutions of the commisssion, which was held at Shanghai, China, from February 1 to February 26, 1909, the American delegates being the Right Rev. Charles H. Brent, Protestant-Episcopal bishop of the Philippine Islands, Mr. Wright, and Mr. Charles D. Tenney, Chinese secretary of the American legation at Pekin; and reviewing exhaustively the opium problem as seen within the United States and its possessions.

The document sets forth and discusses the act of Congress creating the commission, and the instructions to the American delegates; the treaties and other laws internationally restricting the opium traffic; the tariff, internal revenue, and other statutes covering the trade in opium, its derivatives, and other habit-forming drugs in the United States and its possessions; the great increase in the importation of opium into the United States compared with the increase in population; the action of the United States in regard to the domestic opium problem before the assembling of the commission, resulting in the opium exclusion act of February 9, 1909, by which the importation of opium into the United States except for medicinal purposes was absolutely prohibited; the resolutions adopted by the International Opium Commission; the proposed international conference for the purpose of carrying these resolutions into an international convention; together with a tentative programme of legislation to regulate the importation, manufacture, and distribution in interstate commerce of habit-forming drugs, to impose additional internal-revenue taxation, and incidental regulation on the

manufacture of smoking opium within the United States, and to extend the present pharmacy act of the District of Columbia, in substance, to the consular districts of the United States in China.

Summarizing the report as to our previous international relations and the domestic problem in regard to opium and other habit-forming drugs, it is to be observed that the opium traffic in the Far East has been steadily discountenanced by the United States through treaties made which restrict or prohibit American citizens from engaging in that traffic, and by a comparatively recent law to prevent the sale of opium and other illicit articles to the unprotected natives of certain of the Pacific Islands. On the other hand, by permitting the importation of opium prepared for smoking into this country under the dutiable schedules or at times upon the free list, this Government had for half a century unwittingly encouraged the use of this form of opium to the great detriment of Chinese immigrants and to the growing danger not only of the criminal and defective classes, but of the higher ranks of society. Incidental to the unrestricted importation of medicinal opium, the manufacture of morphia had come to be a monopoly of American manufacturers with an enormous growth in production, so that as a notorious fact large numbers of people in all social ranks had become debauched by the misuse of it. Although nearly every State in the Union, and many municipalities, had from time to time passed stringent pharmacy or police laws to control the misuse of the different forms of opium, those laws were largely ineffective because the Federal Government had made no attempt to control the importation and manufacture or distribution of

the drug in interstate commerce. A new drug problem appeared about twenty years ago, growing out of the discovery and surgical use of cocaine, which has proved to be a creator of criminals and of unusual forms of violence and has been a potent incentive in driving the primitive classes of the community all over the country to abnormal crimes. Thoughtful persons, including the importers and manufacturers of these habit-forming drugs, have reached the conclusion that the time has arrived for a strict federal control of the traffic. As a result of these facts, elicited by the preliminary investigations of the opium commission, the act of February 9, 1909, "to prohibit the importation and use of opium for other than medicinal purposes," was passed, and the regulations authorized thereby define the various terms used and enforce the purpose and intent of the law.

Expressing the view that the lack of general and uniform state laws to prohibit the manufacture as well as the use of opium prepared for smoking and the proper use of other forms of opium is a question for the urgent attention of the States, the report submits that "until uniform and effective state legislation is an accomplished fact it would seem to be the duty of the National Government to devise measures to supplement and complete the law of February 9, 1909," and thereupon proposes tentative drafts of acts to govern interstate traffic in habit-forming drugs and to tax the manufacture of smoking opium out of existence. The commission illustrate their position and recommendation by suggesting that the opium problem in the United States needs to be confined by a triangle, one side of which has been laid down by the act pro-

hibiting importation except for medicinal use, another side of which would be formed by the proposed act to control interstate traffic, and the third side of which would consist of an internal-revenue law placing a high tax upon the manufacture of smoking opium.

The resolutions adopted by the Shanghai commission looking to international action were unanimous and to the following effect: That the sincerity of the Government of China in its efforts to eradicate the production and consumption of opium throughout the Empire is fully recognized, and that in view of the action taken by that Government to suppress the practice of opium smoking, and by other governments to the same end, the commission recommends that each delegation move its own government to take measures for the suppression of opium smoking in its own territories and possessions; that the use of opium in any form, except for medicinal purposes, is generally held to be a matter for prohibition or careful regulation aiming at progressively increasing stringency; that it is the duty of all countries to adopt reasonable measures to prevent the shipment of opium and its derivatives at ports of departure to another country which prohibits entry; that the unrestricted sale and use of morphine constitute a grave danger, and that it is highly important for all governments to take measures to control the manufacture, sale, and distribution of this drug and of other derivatives of opium liable to similar abuse; that opium resorts in the foreign concessions or settlements in China should be closed and the trade in so-called anti-opium remedies containing opium or its derivatives therein be prohibited, and that each government should

apply its pharmacy laws to its subjects in the consular districts of China.

The countries participating in the commission beside the United States were: China, France, Germany, Great Britain, Japan, the Netherlands, Portugal, Russia, Austria-Hungary, Italy, Siam, and Persia.

No formal declaration was made by the commission as to further international action, but it was tacitly understood that a subsequent conference, with full powers, would be proposed in order to conventionalize the propositions upon which the commission agreed. Accordingly this Government has now proposed such a conference through diplomatic correspondence, and the replies already received from the interested governments give ground for the confident belief that this conference will be held at The Hague without any great delay, and that the outcome will probably be to give to the main salutary propositions of the Shanghai commission and the essential modifications derived therefrom the force of law and international agreement. In this connection it is appropriate to say that by the act of Congress of March 3, 1905, revising and amending the tariff laws of the Philippine Islands, and under Philippine laws passed in obedience to that act, the importation of opium into the Philippine Islands in any form except for medicinal purposes is forbidden, and the use of opium except for such purposes by any person is also prohibited. It is obvious, therefore, that as regards both the United States and the Philippine Islands it is most important to obtain, if possible, an international agreement preventing as

restricting the shipment of opium from ports of export to countries prohibiting its importation.

This Government has suggested a tentative programme for the conference, not intending, however, to prescribe its scope or present proposals which might not be varied nor enlarged, but believing that its suggestions would properly serve as a basis for discussion and in aid of final action. The report states that programme (pp. 200–202) in the form of concrete propositions, which it is advisable to consider, lettered from a to n. I quote as follows from the conclusion of the report, epitomizing the policy and action of this Government:

Thus since our Government entered the Philippines, and thereby came into direct contact with the opium problem, it has made a sustained effort not only to put its own house in order, but by inviting the powers to coordinate action raised the problem from a national to an international plane. On the latter the opium problem has been studied, discussed, and roundly condemned.

In continuation of its policy our Government has invited the powers to such further cooperation as will place the production, trade in and use of opium under the control of international law. It has been historically demonstrated that no nation working alone, that no two nations working together, are able to destroy the opium vice. It was a hopeless task. To-day as the result of the international efforts initiated by this Government the world is well on its way to see the thorough solution of not only China's oppressive opium problem but that of other countries not so heavily burdened.

It can not be doubted, I think, that in consideration of its intenational relations and duties this Government is called upon to proceed with the

work which it has initiated and to support and pursue the project of a conference which shall effectuate as fully as possible by international agreement the recommendations of the Shanghai commission. The interests of the Government of the United States in and its obligations to the Philippine Islands and their inhabitants forcibly emphasize this duty. No less clear appears to be the domestic duty of supplementing the restrictions upon illicit traffic in opium and other habit-forming drugs and abuse of the same contained in existing federal and state laws by additional legislation of Congress providing for enlarged control through the power over interstate commerce and the power of taxation.

I therefore have the honor to recommend:

That the accompanying report shall be transmitted by you to Congress for its information and appropriate legislative action.

That, the original appropriation of $20,000 for the Shanghai commission having been exhausted now for some months, Congress should be asked to appropriate the sum of $25,000, or so much thereof as may be necessary, so that this Government may be enabled to continue its efforts to mitigate, if not entirely stamp out, the opium evil through the proposed international conference and otherwise by further investigations and proceedings.

That, without the Executiv undertaking to pass upon the constitutionality or the legal advisability of the particular measures of legislation proposed by this report, the attention of Congress should be especially drawn to that subject, in order that appropriate measures may be enacted for the suppression and control of the opium and allied evils.

And finally, that Congress should be asked by you to take steps promptly to apply and extend to our consular districts and the federal judicial jurisdiction in China the provisions of the so-called pharmacy act of the District of Columbia, with such changes as may be necessary and desirable to adapt it to those localities.

Respectfully submitted.

P. C. KNOX.

DEPARTMENT OF STATE,
Washington, February 18, 1910.

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SUPREME COURT OF THE UNITED STATES.

No. 898.—October Term, 1926.

Harry R. Alston *vs.* The United States of America.	On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the United States District Court, Southern District of Iowa, an indictment with three counts, filed December 2, 1924, charged Alston with violating Section 1, Harrison Narcotic Act, approved December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, 40 Stat. 1057, 1130, 1131, by purchasing morphine and cocaine from unstamped packages. He pleaded "guilty" and was sentenced to the penitentiary. A writ of error took the cause to the Circuit Court of Appeals, Eighth Circuit, and it asked our instruction upon certain questions. Thereupon, we required the entire record to be sent here for final determination of the whole matter. § 239, Jud. Code.

Sections 1 and 6 of the Harrison Narcotic Act were amended by the Act of February 24, 1919, and, as thus amended, were re-enacted without change by Sections 1005 and 1006, Revenue Act approved November 23, 1921, c. 136, 42 Stat. 227, 298, 300. The amending Act added the following provisions (among others) to Section 1.

> That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such

tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided* . . .

Section 9 of the original Harrison Act has remained without change. It provides: "That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

The judgment of the trial court is assailed upon two grounds: That Congress has failed to prescribe any punishment for the purchase of drugs from unstamped packages, forbidden by amended Section 1. And, that the entire Act, as amended, is invalid because Congress has undertaken thereby to regulate matters beyond its powers and within exclusive control of the States.

Section 9, above quoted, obviously applies to the requirements of the amended Act as well as to those found in the original. The first objection has no merit.

The present cause arises under those provisions of Section 1 which impose a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages. These provisions are clearly within the power of Congress to lay taxes and have no necessary connection with

any requirement of the Act which may be subject to reasonable disputation. They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the States. The impositions are not penalties.

The judgment of the trial court must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.